

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH COURT NO.IV

SERVICE TAX APPEAL NO. 51198 / 2020

[Arising out of Order-in-Appeal No. 138/Central /Appl-II/Delhi/2020 dated 07.02.2020 passed by the Commissioner of Central Tax (Appeals II) Delhi]

S AND S TECHNOCRAFT P LTD

A-100. Basement, Shivalik,
Malviya Nagar, New Delhi 110017.

APPELLANT

Vs.

**COMMISSIONER, CENTRAL GOODS
& SERVICE TAX COMMISSIONERATE**

EIL Annexe Building
Bhikaji Cama Place, New, Delhi

RESPONDENT

APPEARANCE:

Shri Umesh Sarwal, Advocate for the Appellant
Shri Ravi Kapoor, Authorised Representative for the Department

CORAM:

HON'BLE MRS RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: August 06, 2021

DATE OF DECISION: 26-08-2021

FINAL ORDER No. 51778/2021

PER RACHNA GUPTA

The present appeal has been filed against the Order-in-appeal No. 138/2020 dated 7.2.2020. Briefly stated the facts are as follows:

That the appellants are registered for providing taxable service of construction. Refund claim of Rs.14,15,694/- was filed by the appellant on 14.3.2019 on the ground that three show cause notices were issued demanding the service tax totalling to Rs. 47,17,804/- for three different periods i.e. 2008-2009, 2009-2010

and 2010-2011. The said demand was confirmed along with interest and penalties vide the Order-in-Original dated 27.6.2013. The appeal thereof was rejected vide Order-in-Appeal dated 03.02.2014. The appellant approached this Tribunal assailing the said Order-in-Appeal. However, vide Final Order dated 15.3.2016, the appellant was directed to deposit Rs.15 lakhs as pre-deposit. The Hon'ble High Court of Delhi was moved by the appellant against this Final Order. On 1.6.2016. Hon'ble High Court of Delhi held that since the appellant has already deposited Rs.9.32 lakh, only Rs.5.77 lakh was to be deposited. Same was also observed to be deposited on 16.5.2016. Accordingly, this Tribunal was directed by the Hon'ble High Court to hear the appeal on merits. In compliance of the said directions, this Tribunal vide Final Order dated 02.11.2017 allowed the appeal remanding the matter back to the Commissioner (Appeals) directing to re-decide the issue based upon the decision of Hon'ble Apex Court given in the case of **CCE Kerala vs. M/s. Larsen and Toubro Ltd.** reported in [2016 1 SCC 170] and decision of Tribunal in the case of **Bhayana Builders Pvt. Ltd.** reported in [2013 (32) STR 49 (Tri-Del)].

2. Pursuant to the said order, the appellant filed refund claim for the amount of Rs. 15 lakhs as was paid in lieu of pre deposit for filing the appeal before this Tribunal. The said claim was rejected vide the Order in Original No. MN-DIV/2019-20/R dated 31.10.2019. The appeal thereof has been rejected vide Order under challenge. Still being aggrieved, the appellant is before this Tribunal.

3. It is submitted on behalf of the appellant that the payment of Rs.9.3 lakh was made by the appellant during the period of investigation. Same cannot be considered as payment towards the demand of duty. Rs.5.77 lakh were directed by Hon'ble High Court of Delhi to be paid in addition so as to pay the pre-deposit amount of Rs. 15 lakh for filing the appeal before this Tribunal. The

adjudication of show cause notice is not yet been complete as this Tribunal has already remanded back the matter for fresh adjudication vide its Order dated 20.11.2017. Since the appeal for which the said pre-deposit was made stand decided, the appellants had rightly moved the claim of refund of the said amount. The adjudication on merits in compliance of the said order of remand has not yet been finalised. Hence, three of the show cause notices proposing the recovery of duty from the appellant are still unadjudicated. The amount of pre-deposit cannot be adjusted against the proposal of said show cause notices. Addition of the amount of Rs.9.3 lakh which was paid during investigation was not appropriated even under the show cause notice. The order under challenge being passed in total violation of law and ignorance of Circular No. 984/8/2014 dated 16.9.2014 is alleged to be absolutely wrong, accordingly, is prayed to be set aside and appeal is prayed to be allowed.

4. While rebutting these arguments, learned Departmental Representative has submitted that Commissioner (Appeals) has reasonably explained non applicability of said circular upon the amount of Rs.15 lakh involved in the present appeal. It is submitted that the Commissioner (Appeals) has dully and diligently verified the entire evidence on record for forming the opinion that the appellant has failed to discharge his service tax liability. It is on that count that the refund claim has rightly been rejected. Appeal is accordingly, prayed to be dismissed.

5. After hearing the parties and rival contentions thereof and perusing the record, I observe and held as follows:

It is admitted fact that the order confirming proposal of three separate show cause notices for three different periods was confirmed by the common Order-in-Original as well as common Order-in-Appeal. While assailing the said Order-in-Appeal before this Tribunal Rs. 15 lakh were to be paid by the appellant as an

amount of pre-deposit, pre-requisite for filing the appeal before this Tribunal in view of section 35F of Central Excise Act, 1944 and section 129E of the Customs Act, 1962. Rs. 9.23 lakh out of said Rs.15 lakh is payment which was made by the appellant at the investigating stage and as such has been allowed to be considered as a payment towards pre-deposit. Remaining Rs.5.77 lakh were paid by the appellant during the pendency of his Civil Miscellaneous Application before the Delhi High Court i.e. on 16.5.2016.

6. Both these amounts (Rs.9.23 lakh and Rs. 5.77 lakh) admittedly is an amount toward pre-deposit as was made by filing the appeal before this Tribunal.

7. The said appeal stands allowed by way of remand vide the Final Order of this Tribunal dated 20.11.2017. These admissions are sufficient to hold two things:

1. Appellant is entitled to refund of said amount of pre-deposit (Rs.15 lakh in terms of section 129 E of the Customs Act.
2. Three of said show cause notices are still pending adjudication since the remedy of appeal has already been availed by the appellant. Recovery of demand confirmed by the Commissioner (Appeals) cannot be initiated as is apparent from **Section 129**.

Since the adjudication is still open in terms of order of this Tribunal dated 20.11.2017, the appropriation of amount of pre-deposit made by the appellant against the demand proposed in the impugned show cause notices is highly against the statutory provisions. The findings are, therefore, liable to be set aside.

8. Further, I have perused the Circular No. 984/8/2014 dated 16.9.2014 which clarifies that –

“2. Quantum of pre-deposit in terms of Section 35F of Central Excise Act, 1944 and Section 129E of the Customs Act, 1962:

2.1 Doubts have been expressed with regard to the amount to be deposited in terms of the amended provisions while filing appeal against the order of Commissioner (Appeals) before the CESTAT. Sub-section (iii) of Section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962 stipulate payment of 10% of the duty or penalty payable in pursuance of the decision or order being appealed against i.e. the order of Commissioner (Appeal). It is, therefore, clarified that in the event of appeal against the order of Commissioner (Appeal) before the Tribunal, 10% is to be paid on the amount of duty demanded or penalty imposed by the Commissioner (Appeal). This need not be the same as the amount of duty demanded or penalty imposed in the Order-in-Original in the said case.

It further reads as follows:

2.2 In a case, where penalty alone is in dispute and penalties have been imposed under different provisions of the Act, the pre-deposit would be calculated based on the aggregate of all penalties imposed in the order against which appeal is proposed to be filed.

2.3 In case of any short payment or non-payment of the amount stipulated under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, the appeal filed is liable for rejection.

3. Payment made during investigation:

3.1 Payment made during the course of investigation or audit, prior to the date on which appeal is filed, to the extent of 7.5% or 10%, subject to the limit of Rs 10 crores, can be considered to be deposit made towards fulfillment of stipulation under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962. Any shortfall from the amount stipulated under these sections shall have to be paid before filing of appeal before the appellate authority. As a corollary, amounts paid over and above the amounts stipulated under Section 35 F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, shall not be treated as deposit under the said sections.

3.2 Since the amount paid during investigation/audit takes the colour of deposit under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962 only when the appeal is filed, the date of filing of appeal shall be deemed to be the date of deposit made in terms of the said sections.

3.3 In case of any short-payment or non-payment of the amount stipulated under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, the appeal filed by the appellant is liable for rejection.

4. **Recovery of the Amounts during the Pendency of Appeal:**

4.1

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4.3 Recovery action, if any, can be initiated only after the disposal of the case by the Commissioner (Appeal) / Tribunal in favour of the Department. For example, if the Tribunal decides a case in favour of the Department, recovery action for the amount over and above the amount deposited under the provisions of Section 35F / 129E may be initiated unless the order of the Tribunal is stayed by the High Court/Supreme court. The recovery, in such cases, would include the interest, at the specified rate, from the date duty became payable, till the date of payment.

5. **Refund of pre-deposit:**

5.1 Where the appeal is decided in favour of the party / assessee, he shall be entitled to refund of the amount deposited along with the interest at the prescribed rate from the date of making the deposit to the date of refund in terms of Section 35FF of the Central Excise Act, 1944 or Section 129EE of the Customs Act, 1962.

5.2 Pre-deposit for filing appeal is not payment of duty. Hence, refund of pre-deposit need not be subjected to the process of refund of duty under Section 11B of the Central Excise Act, 1944 or Section 27 of the Customs Act, 1962. Therefore, in all cases where the appellate authority has decided the matter in favour of the appellant, refund with interest should be paid to the appellant within 15 days of the receipt of the letter of the appellant seeking refund, irrespective of whether order of the appellate authority is proposed to be challenged by the Department or not.

5.3 If the Department contemplates appeal against the order of the Commissioner (A) or the order of CESTAT, which is in favour of the appellant, refund along with interest would still be payable unless such order is stayed by a competent Appellate Authority.

5.4 In the event of a remand, refund of the pre-deposit shall be payable along with interest.”

9. After perusing of the above said clarification vide the said circular there remains no doubt about the entitlement of the appellant to have the refund of the amount which was paid as a pre-deposit while filing the appeal before this Tribunal. Learned Commissioner (Appeals) has wrongly ignored the mandate not only

of this Circular but of the statutory provisions/ condition out of which the said circular is flowing.

10. Since the demand is not yet been confirmed, the appropriation of money of pre-deposit against the proposed demand is highly unreasonable and is rather illegal. The Commissioner (Appeals) is observed to have rather failed to make proper compliance of the Final Order of this Tribunal dated 20.11.2017 that too within the reasonable time thereafter. As a result of this discussions, the order under challenge is set aside. Commissioner (Appeals) is directed to decide three show cause notices on merits in compliance of the order of remand order dated 20.11.2017 that too within two months from the date of receiving of this order. Registry to ensure the delivery of copy of this order to the department at the earliest.

11. As a result, impugned order under challenge is set aside and appeal is allowed.

(Pronounced in the open Court on 26-08-2021)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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