CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV.

Service Tax Appeal No. 50220 of 2020 [SM]

[Arising out of Order-in-Appeal No.818 (CRM) ST/JDR/2019 dated 17.09.2019 passed by the Commissioner (Appeals), Jodhpur]

M/s.Vikas Mewara, Proprietor of
V.M. Construction Company **...Appellant**

VERSUS

Commissioner, CGST, Udaipur **...Respondent**

APPEARANCE:

Mr. Vijai Kumar, Advocate for the Appellant
Mr.Nagendra Yadav, Authorized Representative for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING/DECISION:**17/08/2021**

FINAL ORDER No. 51795/2021

RACHNA GUPTA

The present appeal is being filed to assail the Order-in-Appeal No.818/2019 dated 17.09.2019 vide which the appeal of the present appellant against the Order-in-Original bearing No.19/ST/2019 dated 18.03.2019 was rejected invoking the bar of limitation.

2. Briefly, the facts are that the appellant has been registered for providing the taxable service of manpower recruitment supply agency service. On the basis of third party information as was

received from Income Tax Department, Service Tax liability of Rs.4,83,539/- for the period w.e.f. 01.07.2012 to 31.03.2013 was being proposed to be recovered from the appellant vide a Show Cause Notice No.2170-2172 dated 11.04.2018. The said proposal was confirmed initially vide the Order in Original as mentioned above alongwith the applicable interest and the proportionate penalties.

3. Being aggrieved, the order was challenged before Commissioner (Appeals) who has rejected the appeal being barred by time. The appellant is, accordingly, before this Tribunal.

4. I have heard Shri Vijai Kumar, learned Counsel for the appellant and Mr. Nagendra Yadav, learned Departmental Representative for the Department.

5. It is submitted on behalf of the appellant that the Order-in-Original dated 18.03.2019 was never received by the appellant till he got the notice of recovery proceedings and enquired about the said order, it is submitted that the order came to his notice on 17.07.2019 and the appeal has been filed on 7th August, 2019 i.e. within 21 days of receiving the Order-in-Original. It is submitted that Commissioner (Appeals) has failed to appreciate the same and has wrongly rejected the appeal invoking the bar of limitation. Order, accordingly, is prayed to be set aside and appeal is prayed to be allowed.

6. While rebutting the submissions, learned D.R. has impressed upon the findings of Commissioner (Appeals) in para 5.2 of the impugned order impressing upon no infirmity therein that the appeal in hand is prayed to be dismissed.

7. After hearing both the parties and perusing the record, I observe and hold as follows:-

That no doubt date of Order-in-Original is 18.03.2019 but there is no evidence to show as to when the said order was received by the appellant. In para 5.2 of the order under challenge, learned Commissioner (Appeals) has mentioned that "OIO was dispatched by registered post" and has not been received back undelivered, therefore, is deemed to be delivered. The findings itself makes it clear that the findings of Commissioner (Appeals) are merely presumptive. There is no effort on the said adjudicating authority to ensure as to whether the order was actually received by the appellant or not.

8. Period of limitation for filing an appeal before the Commissioner is no doubt of 2 months but this period has to reckon not from the date of Order-in-Original i.e. the order challenged before Commissioner (Appeals), but from the date of receipt of said Order-in Original by the assessee. The valuable right of the assessee to seek a remedy by way of appeal cannot be forfeited based on mere presumptions and surmises. Appellant has placed on record the information as received under RTI Act. The said document is very well on record. Para 2 thereof reads as follows:-

> *"OIO No.19/ST-Dem/2019 dated 18.03.2019 was issued by the Assistant Commissioner, CGST Division-C, Udaipur and the OIO was sent to the Range Office to deliver it to the party and in compliance of the directions, the competent officer visited the premises of the assessee to deliver the same. On the registered premises, nobody was found to receive the OIO then the officer prepared Panchnama at the spot and chaspa it on the registered* addr3ess. The copy of the Panchnama is attached herewith."

9. There is no mention of date of said service. The copy of said Panchnama is also on record. Perusal thereof reveals that appellant was not found available. It is also revealed that the address of said service was 47, Ballabh Bari, Kota as contrary to appellant's address i.e. Flat No.102, Akash Deep-2, Plot No.-155, Ballabh Bari, Gumanpura, Kota. The signatures of witnesses named therein are missing.

10. It is clear that there is no evidence as on what date the Order-in-Original got actually received by the appellant. In the given circumstances, I have no reason to not to accept the submission of the appellant that he got the knowledge of Order-in-Original only when the recovery proceedings got initiated against him pursuant to the said order. An application under RTI Act was filed by the appellant on 09.07.2019. In response thereto Assistant Commissioner provided the copy of Order-in-Original dated 18.03.2019 vide letter dated 01.10.2019. Thus, to my opinion said Panchnama is not the proper compliance of Section 37C (h) of Central Excise Act, 1944. Resultantly, the impugned order in original cannot even be considered as "deemed to have been

served" as mentioned in Section 37C (2) of Central Excise Act, 1944. I, accordingly, hold that learned Commissioner (Appeals) has definitely erred in rejecting the appeal on the ground of limitation for want of the proper compliance of section 37C of the Central Excise Act, 1944. There has otherwise catena of decisions, I draw support from:

1. In **Paliwal Glass Works v. Commissioner of Central Excise, Kanpur [2010 (259) ELT 74 (Tri. – Del.)** it was held;

> *"In absence of evidence that order sent to Assistant Commissioner, Agra was served on party, there is doubt about services of order. Delay must be condoned giving benefit of doubt to the assessee."*

2. In **Triveni Glass Ltd. V. Commissioner of C. Ex., Allahabad [2008 (224) ELT 403 (Tri. – Del.)** it was held that receipt of Order in Original/Notice/Summons is must for calculation of period of appeal.

11. In view of the above findings since the date of receipt of Order-in-Original apparently is 17.07.2019 and the appeal being filed on 7th August, 2019. It is held that the appeal was very much within the period of two months from the date of receipt of Order-in-Original as is required under Section 35A of Central Excise Act. Learned Commissioner (Appeals) is held to have wrongly rejected the same being barred by time. The reliance placed on the decision of Hon'ble Apex Court in the case of **Singh Enterprises vs. CCE, Jamshedpur reported in 2008 (221) ELT 163 (SC)** is

not legally tenable. Accordingly, Commissioner (Appeals) is required to adjudicate the matter on merits. Consequent to above discussion, the present appeal is hereby allowed by way of remand.

[Dictated and pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita