CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH COURT NO.IV

Service Tax Appeal No. 50161/2020

[Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-174-19-20 dated 25.10.2019, passed by the Commissioner (Appeals) CGST & central Excise, Indore (Madhya Pradesh]

M/S.W M UNIVERSAL SOLUTIONS PRIVATE LTD.
402, NRK Business Park, Plot No. B 1
Scheme No. 54, PU-4
Vijay Nagar, Indore
Madhya Pradesh.

APPELLANT

Vs.

COMMISSIONER (APPEALS)
CGST, CENTRAL EXCISE & CUSTOMS,
Manik Bagh Palace, Indore (MP)
Madhya Pradesh 452 014.

RESPONDENT

APPEARANCE:

Shri S Thirumalai, Advocate for the Appellant
Shri Mahesh Bhardwaj, Authorised Representative for the Department

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

DATE OF HEARING/DECISION: September 20, 2021

FINAL ORDER No. 51847 /2021

PER RACHNA GUPTA

The appellant herein has assailed the Order-in-Appeal No. 174-19-20 dated 25.10.2019. The relevant facts, in brief, pertaining to the present appeal are as follows:

That the appellants has filed a refund claim under Rule 5 of CENVAT Credit Rules, 2004 read with Notification No. 27/2012

CE(NT) dated 18.06.2012. On 29.09.2016, the claim was filed with respect to the service provided by the appellant during the period October, 2015 to March, 2016. However, vide Show Cause No. 355 dated 11.01.2017, the refund claim was proposed to be rejected for want of any evidence being produced by the appellant showing compliance of proviso to sub-rule (2) of Rule 5 of CENVAT Credit Rules, 2004. Said proposal was accepted vide Order-in-Original No.13/2017-18 dated 19.4.2017. The appeal thereof has been rejected vide the aforesaid order under challenge however, on limited ground of limitation. Being aggrieved, appellant is before this Tribunal.

2. I have heard Shri S Thirumalai, learned Counsel for the Appellant and Shri Mahesh Bhardwaj, learned Authorised Representative for the Department.

3. It is submitted on behalf of the appellant that as far as merits of the case are concerned, relief has already been extended in favour of the appellant for the period prior as well as post the period of impugned demand. With respect to the rejection of the appeal on ground of limitation, it is submitted that infact the copy of order dated 19.04.2017 was received by the appellant on 03.07.2019 only as is apparent from the departments' own letter dated 02.07.2019. It is submitted that though Original Adjudicating Authority have offered the opportunity of personal hearing on 27.02.2017 but no information about the adjudication order was however received by the appellant. It was on 04.01.2019 that letter was sent by the appellant to the Department asking for the status. Subsequently on 9.11.2019, the application under Right to Information Act was also filed. Copy of order was received on 03.07.2019 pursuant to said letter of

appellant. To support the said receipt that the appellant filed the application under RTI on 09.11.2019. In response thereto, given by the department on 29.7.2020 acknowledging that copy of order-in-original was sent to the appellant vide letter dated 2.7.2019 received by the appellant on 3.7.2019. It is submitted that learned Commissioner (Appeals) has ignored the said relevant facts and the decision has been based on the presumption of the dispatch of order on 21.4.2017 itself. Order is accordingly, prayed to be set aside.

4. Learned Counsel has relied upon the following decisions:

1. Navrattan Jewellers vs. CC
[2020-TIOL-929-CESTAT-Del)];

2. Microsoft India R & D Pvt Ltd.
[2020-TIOL- 1575-CESTAT-Bang];

3. Prince International vs UOI
[2015 (325) ELT 495(BOM)];

4. Suresh Bagna vs COCE
2009 (234) ELT 606];

5. Taranjit Singh Mohan Singh V Sawhney
[2013 (10) SCC 402];

6. M/s. Samsung India Electronics Pvt. Ltd. vs CCE NOIDA
[2019 (11) TMI 1204];

7. M/s. Schiller Healthcare India Pvt Ltd. vs ACC, Chennai
[2021-TIOL-1357-HC-MAD-CUS];

8. M/s. Duggar Fibre PVt Ltd. vs CCE&CGST, Delhi
[2021 (6) TMI 952-CESTAT New Delhi];

9. M/s. M T and N International Corpn. Vs CC
[2021-TIOL-201-CESTAT-Mad];

10. Saral Wire Craft P Ltd. vs. CC CE & ST
[2015-TIOL-154-SC-CX];

11. M/s. Vedanta Ltd. vs CGST Jodhpur
[2019 (12) TMI 115];

12. Amidev Agro Care P Ltd. vs UOI
[2012 (6) TMI 304-Bombay High Court];

13. M/s. OSA Shipping P Ltd. vs CCE & ST
[2015 (10) TMI 982-Madras High Court];

14. M/s. Brahmos Aero Space P Ltd. CC CE & ST, Hyderabad
[2016-TIOL-3243-CESTAT-HYD];

15. CCE, New Delhi vs. Hari Chand Shri Gopal,
[2010 (260) ELT 3 (SC)].

5. To rebut these submissions, learned Departmental Representative has laid emphasis on the order under challenge to have no infirmity nor any illegality therein. It is submitted that it was for the appellant to produce the evidence about not receiving the order immediately after the date of order in original. Hence, there is no reason to set aside the Order under challenge. Otherwise also the Commissioner (Appeals) had no discretion to condone the delay in filing of appeal before him which is for a period of more than 90 days. Appeal is accordingly, prayed to be dismissed.

6. After hearing the rival contentions, the moot question to adjudicate is as to whether the appellant filed the appeal before Commissioner (Appeals) within the statutory period meant for the purpose. To adjudicate the same, the relevant provisions to be considered is one under section 35 of Central Excise Act, 1944 which has to be looked into Section 83 of Finance Act. It reads as follows:

> **SECTION 35. Appeals to [Commissioner (Appeals)].** — (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a [Principal Commissioner of

> Central Excise or Commissioner of Central Excise], may appeal to the [Commissioner of Central Excise (Appeals)] [hereafter in this Chapter referred to as the [Commissioner (Appeals)]] [within sixty days] from the date of the communication to him of such decision or order :
>
> [**Provided** that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]
>
> [(1A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :
>
> **Provided** that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]
>
> (2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner.

Perusal makes it clear that period of 60 days has to reckon from the date of the communication of decision / order to the person aggrieved of the such decision/ order. Mode of communication is prescribed under Section 37C of the Act (CEA, 1944) which reads as follows:

> "**37C**. Service of decisions, orders, summons, etc.- (1) Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served,-
>
> (a) by tendering the decision, order, summons or notice, or sending it by registered post with acknowledgment due, to the person for whom it is intended or his authorized agent, if any;
>
> (b) if the decision, order, summons or notice cannot be served in the manner provided in clause (a), by affixing a copy thereof to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;
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> (c) if the decision, order, summons or notice cannot be served in the manner provided in clauses (a) and (b), by affixing a copy thereof on the notice board of the officer or authority who or which passed such decision or order or issued such summons or notice."

7. The bare perusal of sub clause (a) above clarifies that decision/ orders/ summons/ notices have to be sent by registered post with acknowledgement due to the person for whom it is intended. Joint reading of above sections 35 and 37C makes it abundantly clear that it is date of receipt of dispatch in such modes as prescribed under section 37C, CEA which that is relevant for the reckoning the date period of limitation prescribed therein. This controversy is observed to have settled in various earlier decisions. The Larger Bench of this Tribunal in the case of **Margra Industries Ltd.** reported in [2006 (202) ELT 244 (Tri-LB)] wherein it was held that

> 11. In light of the above we answer the reference as under :-
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> (a) Dispatch of adjudication order by speed post/registered post would not amount to a valid service in the absence of proof of actual delivery of speed post.
>
> (b) The Sections in themselves indicate that there cannot be any simultaneous affixing of the order on the 6 notice board and the affixing of the order has to be considered after failure of the first two modes.

8. The Tribunal Bangalore Bench in the case of **Microsoft India R and D Pvt. Ltd. vs. Commissioner of Service Tax** reported in **[2020-TIOL-1575-CESTAT-BANG]** has also observed that

> "8. Further we find that the High Court of Rajasthan in the case of R.P. Casting Pvt. Ltd. and Vinod Choudhary cited supra have also categorically held that the Department has to prove the delivery of the orders and dispatch of the order is not sufficient for the purpose of calculating the period of limitation for filing the appeal before the Commissioner(Appeals). Further we find that the case laws relied upon by the Department have already been considered by the Larger Bench as per the decision of the Larger Bench and after considering all those decisions, the Larger Bench has come to the conclusion that dispatch of adjudication

order by speed post and registered post would not amount to actual service in the absence of proof of delivery."

9. Further Hon'ble Apex Court in the case of **Saral Wire Craft Pvt. Ltd. vs. Commissioner of Customs, Central Excise & Service Tax** reported in **[2015-TIOL-154-SC-CX]**, it was held that "it is the basic principal of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all." As already recorded section 37C (a) it is clear that statute has provided a particular and precise mode of effecting service of orders/ decisions about the concerned parties, i.e. by registered post, with acknowledgement due, it is the procedure, the way it has been mentioned only has to be followed. This decision has been followed by High Court of Rajasthan in the case of **R P Casting Pvt. Ltd.** reported in **[2016 (344) ELT 168]** and also by Gujarat High Court in the case of **Regent Overseas Pvt Ltd.** reported in **[2017 (6) GSTL 15 (Guj)].**

10. Reverting to the facts of the present case, it is observed that Order-in-Original was announced on 19.4.2017 after affording an opportunity of personal hearing to the appellant on 22.02.2017. However, it is mentioned on behalf of the appellant that there was no subsequent intimation to the appellant about the status of the adjudication post 22.02.2017. Accordingly, the appellant had to file a letter on 4.01.2019 requesting for the status thereof. It is pursuant to the said letter that the Department provided the copy of Order-in-Original to the appellant vide their letter dated 27.05.2019 being received by the appellant on 03.07.2019. respective documents have been produced by the appellant and impressed upon. In addition the appellant has also placed on

record an affidavit sworn by authorised representative/ chartered accountant of the appellant Shri Sunil Kumar Jain .

11. Perusal of the Order under challenge shows that all the submissions have been rejected by the Commissioner (Appeals) holding that there is no evidence on record to show that the appellant has not received the impugned order. This finding, to my opinion, is not sustainable because evidence required by the learned Commissioner (Appeals) will be the evidence proving the negative fact. It is not permissible in the eyes of law. It is otherwise settled provision of law that burden was upon the dispatcher to prove that the documents/ orders / summons/ notice etc. was not merely dispatched but was duly received by the recipient. Apparently and admittedly, there is no such evidence on record which may prove the receipt of Order-in-Original to the appellant within the statutory period required for filing the appeal before the Commissioner (Appeals). Rather it is apparent that it was because of the appellants own efforts that the copy of Order-in-Original could be received by the appellant on 03.07.2019. The appeal before Commissioner (Appeals) was filed on 29.08.2019, i.e. very much within the period of 60 days as required under Section 35 of Central Excise Act. In view thereof, it stands crystal clear that the appeal was filed within the statutory period from the date of receipt of Order-in-Original. Commissioner (Appeals) has observed to have committed an error while calculating the period of limitation from the date of Order-in-Original. There is also failure observed on part of the Department for not dispatching the order-in-original properly through the prescribed mode till it was precisely demanded by the appellant.

12. Copy of the dispatch register that would have been produced by the Department, it was produced by the appellant. Perusal thereof also clearly show that register is silent about the dispatch and acknowledgment of receipt of order and is also silent about the status of post dispatch. In the given circumstances, the Commissioner (Appeals) need to count the limitation from the date when copy of Order-in-Original was made available to the appellant i.e. from 3.07.2019. Seen from that date, the appeal is well within the period of limitation. Hence, the order under challenge is held not sustainable, accordingly is set aside. However, keeping in view that order has not appreciated the merits of the case, it has to be heard by Commissioner (Appeals) himself as far as the merits of the case are concerned.

13. As a consequence of entire above discussion, I hereby remand this matter to Commissioner (Appeals) requiring him to decide the matter on merits. Appeal stand allowed by way of remand.

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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