CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH

Service Tax Appeal No. 51264 of 2020[SM]

[Arising out of Order-in-Appeal No.372 (SM)/ST/JPR/2020 dated 18.08.2020 passed by the Commissioner of Central Goods and Service Tax, Excise & Customs (Appeals), Jaipur]

M/s. Sushila Overseas **...Appellant**
Laxmi Market, Deoli,
Tonk, Rajasthan-304804

VERSUS

Commissioner of C.G.ST &
Central Excise – Jaipur I **...Respondent**
NCR Building, Statue Circle,
C-Scheme, Jaipur,
Rajasthan - 302005

APPEARANCE:

Mr. Pulkit Kapoor, C.A. for the Appellant
Ms. Tammana Alam, Authorised Representative for the Respondent

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

DATE OF HEARING/DECISION:04.03.2022

FINAL ORDER No. 50250/2022

RACHNA GUPTA

The present appeal has been filed to assail Order-in-Appeal the No. 372 (SM)/ST/JPR/2020 dated 18.08.2020. The relevant facts in brief are as follows:

That the appellant is engaged in 100% export of granite/other stone slabs. In relation to export the appellant has been availing the services of many Goods Transport Agencies. On 24.12.2018 appellant filed a refund of Rs.17,26,197/-, the amount of service tax paid for the period from July 2012 to June 2017. The department observed that the said refund claim is in relation to wrong payment of service tax which they have claimed to be exempted vide Notification No. 31/2012 – ST dated 20th June 2012. Accordingly, show cause notice bearing no. 495 dated 04.02.2019 was served upon the appellant proposing the rejection of the said refund. The said proposal was initially rejected vide Order-in-Original No. 916 dated 20.03.2019. The appeal thereof has been rejected vide the order under challenge. Accordingly, the appellant is before this Tribunal.

2. I have heard Shri Pulkit Kapoor, learned C.A. for the appellant and Ms. Tammana Alam, learned Authorized Representative for the Department.

3. It is submitted on behalf of the appellant that the refund claim has been rejected on two grounds;

(1) for want of export documents;

(2) for the unjust enrichment of the appellant.

4. It is submitted that voluminous documents running into more than 10,000 pages were submitted before the Adjudicating Authorities below. The list of such documents is impressed upon to be the part of the record. The copy of EXP-1 and EXP-2 are also mentioned to have been the part of the record. All documents sufficiently prove about the export being made by the appellant. With respect to the second ground of rejection, it is

submitted since service tax was already paid along with the interest and even the amount of penalty was also paid in January 2018 that the said payments were shown under indirect expenses in the profit and loss account of that year. Learned Counsel has impressed upon the affidavit of the partner of the appellant where it has been deposed that in the event of getting the refund the amount shown under indirect expenses shall be credited as income in profit and loss account of the relevant year. With these submissions both the grounds of rejection of refund claim are alleged as wrong. The order under challenge is therefore, prayed to be set aside. The appeal is accordingly prayed to be allowed.

5. While rebutting the submissions learned Authorized Representative has laid emphasis upon the findings in para 5.2 and 5.4 of the order under challenge. It is submitted that since the benefit of exemption was claimed under a notification where certain condition were prescribed, Commissioner (Appeals) has committed no error while rejecting the refund claim on the ground of non-compliance of the said conditions. Further, there is no denial of the fact that the element of service tax has been passed on to the customers, by the appellant. Impressing upon common infirmity in the order under challenge the appeal is prayed to be dismissed.

5. After hearing the rival contentions and perusing the records, the observations and findings are as follows:

There is no denial that appellant is entitled to exemption in terms to Notification No. 31/2012 – S.T. dated 20th June 2012 which exempts taxable service received by an exporter of goods. One of such service is the service provided to exporter in relation to transport of the goods by transport agency in a goods carriage directly from their place of removal to an inland container depot, a freight stations, a port or airport, as the case may be from where the goods are exported. The condition for availing the said exemption is that the exporter has to produce the consignment note by whatever name called as issued in his name.

6. There is no denial that the appellant had satisfied the compliance of the said substantive condition. There is no denial also for the fact that Form EXP-1 and return in Form EXP-2 have also been filed by the appellant. Commissioner (Appeals) has still rejected the claim on the ground of absence of export documents and as such non-compliance of the condition of notification merely for the reason that the substantive documents were submitted with certain delay. The refund of the tax paid under certain exemption notification in favour of the assessee is a substantial benefit being given by the Revenue to the assessee/exporter. The law in this respect has already been settled. This Tribunal, Hyderabad Bench, in the case of **Coromandel Stampings & Stones Ltd. Vs. C.C.E. & S.T., Hyderabad – II reported as 2016 (43) S.T.R. 221 (Tri.-Hyd.)** has held that once there is no dispute about the goods to have been exported and the service tax to have been paid by the exporter, the failure to notify the

Assistant/Deputy Commissioner by filing form EXP 1 and non submission of return in form EXP 2 as are otherwise required under the exemption notification, cannot lead to denial of the substantial benefit of refund. The said lapse is merely a procedural one and the substantial benefit cannot be denied on technical grounds. The Principle Bench of the Tribunal also in the case of **HEG Limited Vs. Commissioner of Customs, C.Ex. & S.T., Bhopal reported in 2019 (29) G.S.T.L. 730 (Tri. – Del.)** has held that once the compliance of all the conditions of notification are undisputed, delay in the said compliance, being merely a procedural lapse cannot be made the basis to deny the substantial benefit as that of refund in terms of the exemption granted to the appellant vide an exemption notification. The delay has specifically been held to be insignificant to deny such a benefit. In view of the documents being duly filed by the appellant proving the export of the goods by availing services of Goods Transport Agency and the payment of service tax in respect thereof. Also keeping in view the entitlement of the appellant for the exemption as per Notification No. 31/2012-S.T. dated 20th June 2012, it is held that delay in compliance of the conditions of said notification is wrongly held to be a reason to deny/reject the refund of the service tax paid. In view of the case laws discussed above, the rejection on this ground is hereby set aside.

7. Coming to the second ground of rejection, admittedly the service tax stands already paid by the appellant and for the purpose the appellant had to collect the same from the customers.

Till that stands paid and is not refunded, to my opinion, there seems no error when the appellant has shown the said under indirect expenses in the profit and loss account. The appellant's partner had produce an affidavit before the Adjudicating Authorities deposing that in the event of getting the refund the entire amount shall be credited as income in the profit and loss account of the relevant year. The Commissioner (Appeals) has miserably failed to take into consideration the said deposition on oath made on behalf of the appellant. Otherwise, also till the refund of service tax paid is not sanctioned and is not credited to the appellant's account it cannot be recorded by the appellant as income, it merely being an expense. Presumption that the entries in profit and loss account showing the payment of service tax as expense is the case of unjust enrichment is held to be a wrong presumption. Hon'ble Bombay High Court, in the case of **Commissioner of Central Excise, Pune-I Vs. Sandvik Asia Ltd. reported in 2015 (323) E.L.T. 431 (Bom.)**, has clarified that presumption of passing on incidence of duty is absolutely immaterial and irrelevant. Hon'ble Bombay High Court clarified that even if the amount has been shown as 'expenses' in accounts, it does not mean that the burden has been passed on to the consumer. In the present case, there, in addition, is a deposition on behalf of the appellant that too in the form of affidavit that the burden shall not be remaining with consumers and the entries of profit and loss accounts shall be accordingly changed. Keeping in view the said deposition and the above discussed decision, the findings of Commissioner (Appeals) with respect to the element of unjust enrichment of the appellant are held merely presumptive in nature. The rejection on said account also is therefore held to be irrelevant.

8. In view of the entire above discussion both the grounds of rejection of refund claim by Commissioner (Appeals) are held irrelevant and contrary to the decisions already made by this Tribunal and the High Courts and rather presumptive. The order under challenge is accordingly set aside. As a result the appeal stands allowed.

[Dictated and pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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