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

**PRINCIPAL BENCH COURT NO.IV**

**SERVICE TAX APPEAL NO. 51035/2021**

Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-146-2020-21 dated 17.03.2021 passed by the Commissioner (Appeals)CGST & Central Excise, Indore]

**NARENDRA KUMAR JATASHANKAR** **APPELLANT**

Vs.

**COMMISSIONER (APPEALS),**
CENTRAL EXCISE & CGST,
Manik Bagh Palace**, INDORE** **RESPONDENT**

**APPEARANCE:**

Shri Krishan Garg, Advocate for the Appellant
Ms Tamana Alam, Authorised Representative for the Department

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

**DATE OF HEARING /DECISION: MAY 10, 2022**

**FINAL ORDER No. 50426 /2022**

**PER DR. RACHNA GUPTA**

Present appeal is arising out of Order-in-Appeal No. 146/ 2020-21 dated 17.03.2021 vide which the application seeking refund of Rs.4,78,222/- as was paid as Service Tax for which the appellant was not otherwise liable, has been rejected.

2. The facts in brief are that the appellant was providing construction of complex service to M P Police Housing Corporation Ltd. The said services were exempted from the liability of Service Tax prior to March 2015 and same exemption was

reaffirmed with effect from 1.3.2016. Hence When the appellant were not actually clear about their liability towards the Service Tax on the impugned services. But to be, on safer side the appellant got deposited Rs.4,78,222/- apprehending the tax liability for providing the service of construction of 12 +48 flats at 1st Batalian SAF, Indore in the year 2015-2016. Later, it was clarified that construction services were exempted which were provided to MP Police Housing Corporation. and that the department had not charged any service tax. In view thereof the appellant moved an application dated 11.8.2020 seeking the refund of the aforesaid amount of Service Tax paid on 14.3.2016. The said application was rejected vide Order-in-Original No. 01/2020 -2021 dated 20.10.2020. Appeal thereof has been rejected vide order under challenge. Being aggrieved the appellant is before this Tribunal.

3. I have heard Shri Krishan Garg, learned Counsel for the Appellant appearing for the appellant and Ms Tamana Alam, learned Authorised Representative appearing for the Department

4. Learned Counsel for the appellant has mentioned that the amount in question was deposited under the mistake. The appellant was not otherwise liable to pay the Service Tax which was deposited due to lack of clarity. It is submitted that since the said amount was not the liability, i.e. it was not tax, hence has wrongly been covered under section 11B of Central Excise Act for time bar. The said provision has wrongly been invoked by the Adjudicating Authorities below.

Learned Counsel relied on decision of this Tribunal in the case of **M/s. Ishwar Metal Industries vs. CCE & CGST, Jaipur** vide **Final Order No. 50064/2022 dated 28.1.2022**.

5. Learned Departmental Representative on the other hand, laid emphasis upon the Order-in-Appeal and the findings therein,

specifically in para 11 of the said order. Impressing upon no infirmity therein, the appeal is prayed to be dismissed.

6. After hearing the rival contentions it is observed and held as follows:

The claim of refund has been rejected invoking the time bar under section 11B of Central Excise Act. Section reads as under:

> "**SECTION [11B. Claim for refund of [duty and interest, if any, paid on such duty]**. — (1) Any person claiming refund of any [duty of excise and interest, if any, paid on such duty] may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year] [from the relevant date] [[in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of [duty of excise and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person :
>
> **Provided** that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :]
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> [**Provided** further that] the limitation of [one year] shall not apply where any [duty and interest, if any, paid on such duty] has been paid under protest.
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> [ * * * * ]
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> [(2) If, on receipt of any such application, the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] is satisfied that the whole or any part of the [duty of excise and interest, if any, paid on such duty] paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :
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> **Provided** that the amount of [duty of excise and interest, if any, paid on such duty] as determined by the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -
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> (a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
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> (b) unspent advance deposits lying in balance in the applicant's account current maintained with the [Principal Commissioner of Central Excise or Commissioner of Central Excise];

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;
(d) the [duty of excise and interest, if any, paid on such duty] paid by the manufacturer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;
(e) the [duty of excise and interest, if any, paid on such duty] borne by the buyer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;
(f) the [duty of excise and interest, if any, paid on such duty] borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :
**Provided** further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of [duty and interest, if any, paid on such duty] has not been passed on by the persons concerned to any other person.
(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).
(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.
(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.]
[***Explanation*. —** For the purposes of this section, -
(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
(B) "relevant date" means, -
(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -
(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or
(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;
(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;
(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;
(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;
[(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;]
[(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;]
[(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;]
[(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;]
(f) in any other case, the date of payment of duty.]"

7. Perusal makes it clear that section is applicable for the refund of such an amount which can be called as duty/tax. Hence the moot controversy in the present case is:

" whether the amount of Rs.4,78,222/- as was deposited by the appellant on 14.3.2016 was the amount of duty/tax."

8. Apparently and admittedly the said amount was deposited under the wrong impression of appellant being the liable to Service Tax for providing the construction service to M P Police Housing Corpn. Ltd. There is no denial to the fact that these services were exempted from the tax liability till March 2015 under Notification No. 06/2015 dated 1.3.2015. There is also no denial to the fact that the exemption was removed only for the period of one year i.e. from March 2015 to March 2016. From the

notification No. 06/2015 vide Notification No. 9/2016 dated 1.3.2016, the retrospective exemption for the construction services provided under contract prior to 1.3.2015 was announced. The notification reads as follows:

> "12A. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -
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> (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;
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> (b) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment; or
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> (c) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause (44) of section 65 B of the said Act;
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> under a contract which had been entered into prior to the 1st March, 2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date :
>
> provided that nothing contained in this entry shall apply on or after the 1st April, 2020;"

9. There is no denial to the fact that service in question were rendered by the appellant in favour of the contract with M P Police Housing Corpn. Ltd. dated 30.6.2014 i.e. the contract was prior to 1.3.2015. Hence, irrespective the construction was raised during the year 2015-16, the exemption to the liability as introduced vide Notification No. 9/2016 is very much applicable to the impugned service. This perusal makes it abundantly clear that the appellant was not liable to pay Service Tax for rendering the services in question. Consequently, it is held that the amount of Rs.4,78,222/- was not the amount of Service Tax. It was merely a deposit being made by the appellant in view of the ongoing confusion about the liability. The law with respect to the deposits being made by the assessee due to mistake either of the fact or of law is no more res integra to the effect that section

11B of Central Excise Act is not applicable to such deposits. Time bar of said section cannot be invoked while refunding the amount of deposit.

10. I place reliance on **M/s. Parle Agro Pvt Ltd.** reported as (**2021-TIOL-306-CESTAT-ALL**) and also endorse the following findings:

> "30. In the present case, the provisions of section 11B of the Excise Act would not be applicable. This is for the reason that the appellant was not claiming refund of duty. The applicant, as noticed above, had claimed refund of the revenue deposit. Such a finding has also been clearly recorded by the Tribunal in the order dated 31.01.2017, which order has attained finality.
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> 31. Section 11D of the Excise Act deals with duties of excise collected from the buyer to be deposited with Central Government. It provides that every person who is liable to pay duty and has collected any amount in excess of the duty assessed from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.
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> 32. Section 11DD of the Excise Act deals with interest on the amount collected in excess of the duty. It provides that where an amount has been collected in excess of the duty from the buyer of such goods, the person who is liable to pay such amount shall, in addition to the amount, be liable to pay interest at such rate not below ten per cent., and not exceeding thirty-six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette.
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> 33. There is no provision in the Excise Act, which deals with refund of revenue deposit and so rate of interest has not been prescribed, when revenue deposit is required to be refunded."

11. This Tribunal in the decision of Bangalore Bench in the case of **CCE, Nasik vs Motor Industries Ltd.** reported as **[2006 (205)ELT 274 (Tri-Bang)]** while accepting the appellants contention has dismissed the departmental appeal in following words:

> **"2.** On a careful consideration, I notice that the assessee had cleared inputs for processing under Rule 57F(4) which were not received back fully within the stipulated period. The appellants paid the duty of Rs 4,71,197/- in RG 23-A, dated 30-9-97 as directed by the preventive team of Central Excise Officers. However, the goods were received back

subsequently and hence they filed refund application. The question is as to whether the Commissioners has power to condone the delay in a circumstance when the inputs were received after a period of 60 days. The Commissioner has noted that the proviso of Rule 57 was amended to 180 days and found that this is only a condonable offence. Therefore, he noted that the amount deposited was required to be refunded. He also noted that the assessee had deposited the amount only on the insistence of preventive officers. Therefore it is to be construed as a deposit under protest. On similar facts in the cited judgments, such deposits are treated as deposits made 'under protest'. Further more, the Apex Court in the case of *Mafatlal Industries Ltd*. v. *UOI* [1997 (89) E.L.T. 247(S.C.)] has clearly ruled that if duty deposits are made during investigation, then it is to be construed as deposit made under protest. The order passed by the Commissioner is legal and proper and there is no infirmity in the same. The appeal is rejected."

12. In view of the entire above discussion, the order under challenge is set aside. Appeal stands allowed.

**(DR. RACHNA GUPTA )**
**MEMBER (JUDICIAL)**

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