

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

PRINCIPAL BENCH – COURT NO. IV

SERVICE TAX APPEAL No. 51438 of 2022

[Arising out of Order in Appeal No. EX-CUS-000-APP-021-022 – 2021-22 dated 15-06-2021 passed by the Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Indore]

M/s. Jethanand Arjundas & Sons,

...Appellant

Babal Chhaya
82 – Triveni Colony
Manik Bag Road,
Indore (MP)

New Address: Jithanand & Sons,
Samyak Tower, Ground Floor,
16/3, Old Palatial,
Nr. I.K.D.C. College,
Indore – 452018.

Versus

**The Commissioner,
Central Excise & Central GST, Indore**

....Respondent

Manik Bag Palace
Indore (MP)

APPEARANCE:

Mr. Rohit Choudhary & Ms. Preeti, Advocates for the appellant
Mr. Mahesh Bhardwaj, Authorized Representative for the Respondent

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

Date of Hearing/ Decision: **06/01/2023**

FINAL ORDER No. 50039/2023

DR.RACHNA GUPTA

The present appeal has been filed to assail the order in Appeal No. EX-CUS-000-APP-021 to 022 – 2021-22 dated 15.06.2021 vide which the order of rejection of refund claim of the appellant has been upheld. The facts in brief giving arise to the present appeal are reproduced herein below:-

The appellant is engaged in providing service of commercial and industrial construction and construction of residential complex and has also been registered for providing the said services. A Show Cause notice dated 13th January, 2012 was issued to the appellant proposing recovery of service tax for an amount of Rs.1,80,80,651/- for the period from 1st April 2009 to 31st July, 2011 alleging that the construction services as being provided by the appellant were for the purpose of commerce and were therefore taxable. The demand was confirmed vide the Order-in-original dated 29.03.2013, however, for an amount of Rs.9423765/- alongwith the equal amount of penalty. The amount already deposited by the appellant i.e. an amount of Rs.20,19,000/- was also appropriated against the said confirmed demand. The said order was challenged before this Tribunal vide Final Order No.58238/2013 dated 14.11.2018.

2. The demand confirmed against the appellant alongwith the order of appropriation was set aside. It s thereafter that the applicant filed an application dated 06.10.2020 to claim the refund of Rs.19,34,552/- (deducting an amount of Rs.1,27,000/- as was deposited prior the initiation of investigation on 31.07.2008). However, vide Show Cause Notice No.189 dated 24.12.2020 the refund claim was proposed to be rejected for the reasons that the amount has not been deposited under protest by the claimants and that the amount was deposited prior the beginning of investigation on 31.07.2008. The said proposal has been confirmed vide Order-in-Original bearing No.04/2020-21/223 dated 03/02/2021 invoking

Section 11B of Central Excise Act and the limitation of one year prescribed therein. The said order has been upheld vide the Order-under-challenge. Being aggrieved, the appellant is before this Tribunal.

3. I have heard Shri Rohit Choudhary, Id. Counsel for the appellant and Shri Mahesh Bhardwaj, Id. Authorised Representative (D.R.) for the Department.

4. Ld. Counsel has submitted that Department has committed an error while invoking Section 11B of Central Excise Act as the said Section deals with respect to the refund of duty. Whereas the final order of this Tribunal dated 14.11.2018 has absolved the appellant out of the duty liability as was confirmed by the Department. It is further submitted that the amount was got deposited by the Department from the appellant during the period of investigation itself. Since the demand of duty as was alleged by the Department stands set aside the said deposited amount cannot be held to be an amount of duty. The said amount was held to be an amount of pre-deposit vide the stay order of this Tribunal bearing No.52938/2015 dated 04.08.2015. The appellant is very much entitled for the refund of the said amount in terms of section 35FF of the Central Excise Act. Ld. Counsel has also relied upon the Boards Circular No. 984/08/2014-CX and F. No.390/Budget/1/2012-JC dated 16.09.2014 impressing upon that the payments made during the investigation are held by the Department itself, to be the payments as that of pre-deposit under

section 35 F of Central Excise Act 1944 or under Section 129 E of Customs Act, 1962. The Circular further elaborates that for such deposits the date of filing of appeal shall be deemed to be the date of deposits made in terms of the said section. The Circular also clarifies that pre-deposit for filing an appeal is not the payment of duty.

5. Ld. Counsel has also relied upon the decision of Hon'ble High Court of Allahabad in the case of **Ebiz.Com Pvt. Ltd. Vs. Commissioner of Central Excise, Customs and Service Tax and Ors. Reported as was passed in Civil Miscellaneous Writ Petition No.578/2016 decided on 12.09.2016** wherein it was held that the amount deposited by the assessee till is not appropriated by the Department it shall remain in the nature of deposit or pre-deposit. With these submissions it is impressed upon that Section 11 B has wrongly been invoked. The one year limitation of the said section is not applicable to the impugned amount which is apparently a pre-deposit / a deposit. It is further impressed upon that even if the limitation has to be looked into the date reckoning for the same is not the Final Order of the CESAT dated 14/11/2018 but it is the date of the order of High Court passed pursuant to the Departmental Appeal against the aforesaid Final Order of 14.11.2018 which shall be the relevant date. The said order was passed on 20/02/2020. Hence, the refund claim of 06/10/2020 is otherwise within the limitation. With these submission, Ld. Counsel has prayed for the order of Commissioner

(Appeals) dated 15.06.2021 to be set aside and the impugned appeal to be allowed.

6. Per contra, Id. D.R. while rebutting these submissions has relied upon the findings recorded by Commissioner (Appeals). Para No.15 of the Order has been specifically impressed, where the Commissioner has relied upon Explanation (e c) to Section 11B of Central Excise Act to consider the date of the order of the Appellate Tribunal to be the relevant date. Id. D.R. has impressed upon that there is no infirmity in those findings. It is further impressed upon that even as per the Circular dated 16.09.2014 it is clear that the amounts paid over and above the amounts stipulated under section 35F of Central Excise Act, 1944 or section 129 E of Customs Act, 1962 shall not be treated as deposit under the said sections as has been recorded in para 16 of the order. With these submissions, Id. DR has prayed for the appeal to be dismissed.

7. Having heard the rival contentions of the parties, the moot controversy to be adjudicated appears as :-

“Whether the refund claim is hit by limitation of one year as prescribed under section 11 B of Central Excise Act, 1944?”

Section 11 B is reproduced as follows:-

“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 Dy. Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed."

Opening line of the section reveals that the section can be invoked if and only if the claim is for the refund of duty and interest, if any, paid on such duty. The amount in question apparently and admittedly, is an amount as was paid by the appellant during the investigation i.e. with effect from 29.09.2008 to 29.09.2009 (as is apparent from Order-in-Original dated 26.03.2013 attached on record). The Demand was otherwise raised by Show Cause Notice dated 13.01.2012. The demand was initially proposed for Rs.1,80,80,651/- and the proposed demand was confirmed partially for an amount of Rs.94,23,765/-. Apparently and admittedly, when this confirmation of demand was challenged, this Tribunal vide Stay Order of 04.08.2015 held that the amount already deposited by the appellant in proportion to the confirmed demand, is such as meets the requirement of section 35 of Central Excise Act, 1944 read with Section 83 of the Finance Act (para 4 of the said order). These observed facts are sufficient for me to hold that the amount for which the refund is claimed was an amount of deposit/pre-deposit. I draw my support from the decision of Hon'ble Apex Court in the case of **Sandvik Asia Ltd.**

Vs. Commissioner of Income Tax, Pune reported in 2006 (196) ELT 0257 (S.C.) wherein it is held that any amount deposited during investigation pending litigation is *ipso facto* an amount of pre-deposit and even interest is payable on such amount to the assessee being successful in appeal from the date of deposit till the date of refund. This Tribunal also in the decision of **M/s. Parle Agro Pvt. Ltd. Vs. Commissioner, GST [2021-TIOL-306-CEST-ALL]** has held as follows:-

"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.

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.

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.

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."

8. Allahabad High Court also in the case of **Ebiz.Com Pvt. Ltd.** (Supra) (as relied upon by the appellant has held that any amount which was paid at the initial stage of investigation but has not finally been appropriated, the said amount is in the nature of deposit or pre-deposit. The Circular as relied upon by the appellant also is in the lines of the above discussed settled provision of law.

Para 3 of that Circular reads as follows:-

"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 fulfilment 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."

Para 5 thereof that Circular reads as follows:-

"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.

5.5 In case of partial remand where a portion of the duty is confirmed, it may be ensured that the duty due to the Government on the portion of order in favour of the revenue is collected by adjusting the deposited amount along with interest.

5.6. It is reiterated that refund of pre-deposit made should not be withheld on the ground that Department is proposing to file

an appeal or has filed an appeal against the order granting relief to the party. Jurisdictional Commissioner should ensure that refund of deposit made for hearing the appeal should be paid within the stipulated time of 15 days as per para 5.2 supra."

9. Thus, it becomes clear that the amount of Rs.19,34,552/- the refund whereof was claimed the entire amount irrespective it was above 7.5 % / 10% of Section 35 F of Central Excise Act but was not at all an amount of duty rather it was still an amount with the Department as a deposit made by the appellant. The Department has no authority to retain the said amount. Such retention is otherwise specifically barred in terms of article 265 of Constitution of India.

10. In view of entire above discussion, it is held that Commissioner (Appeal) has wrongly invoked section 11 B of Central Excise Act for applying the time limitation prescribed under the said section while rejecting the impugned refund claim. Hon'ble Apex Court in **Sandvik Asia** (supra) had clarified that no time limit can be made applicable for the refunds with respect to the amount of deposits/ pre-deposits (as already discussed above). Resultantly, the order under challenge is hereby set aside. Consequent thereto appeal stands allowed.

[Order dictated & pronounced in the open Court]

(DR.RACHNA GUPTA)
MEMBER (JUDICIAL)