CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

SERVICE TAX APPEAL No. 54875 of 2023

(Arising out of Order in Appeal No. 06/ST/DLH/2023 dated 23.02.2023 passed by Commissioner (Appeals-I), Central Excise & Central Goods and Service Tax, Delhi)

M/s.Wave One Private Limited **...Appellant**
M-4, Mezzanine Floor,
South Extension Part-II
New Delhi-110049

Versus

Commissioner **....Respondent**
Office of the Commissioner (Appeals-I),
Central Goods and Service Tax and
Central Excise, Delhi
Room No.134, Central Revenue Building,
Indraprastha Estate, New Delhi.

APPEARANCE:
Mr. A.K.Batra & Ms. Sakshi Khanna, Chartered Accountants for the appellant
Mr. V.J. Saharan, Authorized Representative for the Respondent

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

Date of Hearing/ Decision: **31.10.2023**

FINAL ORDER No. 51564/2023

DR.RACHNA GUPTA

The present appeal has been filed to assail the Order in Appeal No.06/2023 dated 23.02.2023. The facts relevant for the purpose, in brief, are as follows:-

That the appellants are engaged in providing construction services. They agreed to extend the said services to two of their clients M/s. "3 ACES Enterprises Pvt. Ltd." and "Mohd Arafat Abdullah" and raised the invoices charging the service tax on the amount of invoices. They discharged their service tax liability also with respect to those invoices. However, in the month of October, 2017 due to the fact that both the said clients cancelled their booking for property to be constructed by the appellants, the invoices issued for the said services with reference to both of the said clients got cancelled. The appellant returned the invoice amount and refunded the said amount to those clients on 14.07.2017, 25.07.2017, 16.08.2017 and 13.09.2017. After refunding the same the appellants filed a refund application on 14.06.2019 to claim the refund of the amount of service tax as was deposited in respect of those invoices the amount whereof was refunded to the appellants. However the said refund claim was proposed to be rejected vide SCN No. 04/2020-21 dated 13.05.2020. The proposal of rejection has been confirmed initially vide the Order in Original No.03/2019-20 dated 16.06.2022. The appeal against the said order, filed by the assessee, has been rejected vide the impugned order under challenge. Being aggrieved the appellant is before this Tribunal.

2. I have heard Mr. A.K. Batra. ld. Chartered Accountant on behalf of the appellant and Mr. V. J. Saharan, ld. Authorized Representative on behalf of the Department.

3. Ld. Chartered Accountant has submitted that the appellants were though supposed to provide the construction services to their clients, however, due to certain circumstances the agreements for providing those services got cancelled. Pursuant whereto the credit notes were issued to the proposed recipients of

the service. It is impressed upon that in view of the said cancellation, no service in fact was rendered by the appellant. Hence, the amount of Rs.18,09,321/- which they deposited prior cancellation of the agreement towards their liability to pay service tax no more remained the amount due to the Government Exchequer. Till the time the agreements got cancelled, the Goods and Service Tax Act of 2017 came into existence. Accordingly, the impugned refund was filed in terms of provisions of section 142 (5) of the CGST Act – read with section 142 (3) thereof. It is impressed upon that in view of the said provision there arises no reason to invoke the time bar given under section 11 B of Central Excise Act. To impress upon ld. Chartered Accountant has relied upon the decision:

1. M/s. Jai Mateshwaari Steels Pvt. Ltd. vs. Commissioner, CGST Dehradun dated 11.02.2022 reported as 2022 (3) TMI 49 – CESTAT, New Delhi
2. M/s. Doowon Automotive Systems India Pvt. Ltd. vs. Commissioner of GST & Central Excise, Chennai dated 19.05.2022 reported in 2022 (5) TMI 984 – CESTAT, Chennai.
3. Punjab National Bank vs. Commissioner of Central Tax Bangalore North dated 07.07.2021 reported as 2021 (7) TMI 326 – CESTAT, Bangalore
4. M/s. Lifecell International Pvt. Ltd. vs. Commissioner of GST & Central Excise, Chennai dated 22.06.2022 reported as 2022 (6) TMI 1134- CESTAT, Chennai.

4. It is further impressed upon that in the given circumstances since the payment was not towards any liability, the department was left with no authority to retain the same. The Refund has wrongly been rejected by the adjudicating authority below. The case laws relied upon the same is as follows:-

1. Rattanindia Power Ltd. vs. CCE & CGST, Delhi dated 05.04.2022 reported as 2022 (65) GSTL 122 (Tri.- Del.)
2. Raj Construction vs. CCE & CGST, Jaipur dated 07.06.2022 reported as 2022 (66) GSTL 450 (Tri.- Del.)

5. With these submissions ld. Chartered Accountant has prayed for the order under challenge to be set aside and appeal to be allowed.

6. While rebutting these submissions, ld. Departmental Representative has impressed upon the findings given in para 5.2 of the order under challenge where the adjudicating authority has specifically held that section 142 of CGST Act – nowhere provides for any relaxation of time limit for filing the refund claim under section 11B of Central Excise Act, 1944. Apparently and admittedly the refund is filed more than one year after the relevant date i.e. the date of payment. Hence there is no infirmity in the order under challenge. Appeal is accordingly prayed to be dismissed.

7. Having heard the rival contentions and perusing the entire record, I observe and hold as follows:-

That the appellant had filed the impugned refund claim after the contract of the appellant with its service recipient got cancelled. The original adjudicating authority has adjudicated the impugned refund claim on four different counts:-

1) Whether the assessee has filed their refund clazim with the correct jurisdictional authority.
2) Whether the assessee has filed their refund claim within the period of one year as required under section 11B of the Act as applicable in service tax matters also.
3) Whether the refund claim is admissible to the assessee.
4) Whether any unjust enrichment is involved in this case or not.

8. Out of these four issues framed by the original adjudicating authority three issues have been decided in favour of the assessee holding that the claim has been filed before the correct jurisdictional authority. The claim is very much available to the assessee and that there is no unjust enrichment involved in this case. The refund claim has still been rejected only one issue i.e. of time bar holding that the refund claim has not been filed within one year as is required under section 11B of the erstwhile Central Excise Act. Those findings have fully been endorsed and upheld by the Commissioner (Appeals) vide the impugned order under challenge. In the light of these observations, the narrow point of adjudication for the present appeal is as to whether the refund claim in the given set of circumstances where it has been filed after introduction of CGST Act gets hit by limitation.

For the purpose, the relevant provision of the CGST Act section 142 (5) is foremost perused under which the impugned claim has been filed. It reads as follows:-

> *(5) Every claim filed by a person after the appointed day for refund of tax paid under the existing law in respect of services not provided shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944. (1 of 1944).*

9. The bare perusal makes it clear that Section 142(5) of CGST Act, 2017 provides that the refund claim of service tax paid under the existing law (Central Excise Act, 1944) in respect of services not provided shall be disposed of under the existing law and has to be paid in cash. It states that such refund is subject to provisions of sub-section (2) of section 11B of Central Excise Act, 1944 only. In the present case, refund has been rejected on the ground of being filed beyond the period of one year as stipulated in sub-section (1) of section 11B. The contract having been annulled on 9.8.2018, it cannot be expected of the appellant to file the refund claim within a period of one year from the date (6.6.2017) of payment of service tax. Further, section 142(5) expressly states that the limitation provided in sub-section (1) of section 11B is not applicable.

10. Thus it is only in case of unjust enrichment to the appellant that he can be denied the refund of the amount which was available to him under existing/ erstwhile law. The appellant was eligible for Cenvat Credit of the amount paid in terms of Rule 6 (3) of the erstwhile statute had there been no cancellation of the contract for providing the service as already observed above, the adjudicating authority below have held that the assessee in the present case has not been unjustly enriched. These observations are sufficient for me to hold that section 11B of erstwhile Act cannot at all be invoked, specifically the time bar therein, to rejected the refund claim as was filed under section 142 (5) of the CGST Act. The issue has no more been *res integra*. This Tribunal Bangalore Bench in the case of **Punjab National Bank vs. Commissioner of Central Tax** 2021 (52) GSTL 421 (Tri. Bang.) has already held as follows:-

> *"5.1 Further I find that it is a settled legal position that if there is a conflict between the substantive provision of the statute and the Rules framed thereunder then it is the statute which will have a overriding effect and in the present case Section 142(9)(b) has a overriding effect over Section 11B of the Central Excise Act, 1944. If I analyze the provision of Section 142(9)(b) of the CGST Act which provides as follows:*
>
> *(a) Where return filed under the existing law is revised after the appointed day but within the time limit prescribed for revision of return under the existing law;*
>
> *(b) Pursuant to filing of revised return, when closing balance of Cenvat credit increases as compare to closing balance of Cenvat credit in original return;*

(c) In this case the registered person is required to file refund for the differential amount; (d) The differential amount shall be refunded to registered person in cash as per provisions of existing law

(e) Notwithstanding anything to the contrary contained in the said law other than the provisions of sub-section (2) of Section 11B of the Central Excise Act, 1944.

5.2 Further, I find that the words "notwithstanding anything contrary contain in said law" means that the provisions of this Section will prevail over provisions of existing law except provision of Section 11B(2) of Central Excise Act, 1944. The Section 11B(2) of Central Excise Act, 1944 contains provisions relating to granting of refund in case of unjust enrichment. Thus, as far as conditions of Section 142(9)(b) of CGST Act, 2017 is concerned, the appellant has fulfilled the said conditions and hence is entitled for refund. As far as new ground taken by the Learned Commissioner that the appellant has filed the revised return late is not valid because this ground has not been raised either in the show cause notice or in the Order-inOriginal and hence the Commissioner (Appeals) is not justified to invoke a new ground to reject the refund claim. Further, I find that it is a settled law that whenever two options are available, the assessee may choose the option which is more beneficial for them and in the present case the assessee/appellant has chosen to file the refund claim under Section 142(9)(b) of CGST Act, 2017 which has a overriding effect over Section 11B of Central Excise Act, 1944. The appellant did not choose to carry forward the credit in TRAN-1 and preferred to claim cash refund as provided under Section 142(9)(b) of CGST Act, 2017. Further, I find that both the authorities have held that the appellant failed to furnish the original invoices which are necessary for verification of the claim of refund of the appellant.

6. In view of my discussion above, I set aside the impugned order holding that appellant is entitled for cash refund in view of Section 142(9)(b) of the CGST Act but for the purpose of verification of original invoices/documents, I remand the case back to the original authority for the limited purpose of *verification of the invoices/ documents. The original authority will grant the refund after verification of the document and after following the principles of natural justice. The original authority will decide within a period of three months from the receipt of the certified copy of this order. The appeal is accordingly disposed of by way of remand."*

(Emphasis supplied)

11. Coming to the plea raised on behalf of the Department as has been mentioned in para 5.2 of the order under challenge holding that since the amount was paid to the Government as service tax it is section 11 B only which shall be applicable. I observe that the tax liability arises towards an amount received for providing a service in the case when the service is either provided or is to be provided. In the present case from the apparent admission for the fact that the agreement for providing service was got cancelled at the stage when no service was yet provided, there remains no scope for any service to be provided in future. Thus, there remains no occasion for any tax liability on the appellant and no authority with the Government to collect such an amount. In view thereof and in view of Article 265 of Constitution of India, the authority cannot retain the said amount. I draw my support from the decision of Hon'ble Supreme Court in the case of **Collector of Central Excise**, **Chandigarh v. M/s. Doaba Cooperative Sugar Mills Ltd., Jalandhar - 1988 (37) E.L.T. 487 (S.C.) = 1988 Supp. SCC 683; Escorts Ltd. v. Union of India - [1994] Supp. (3) SCC 86** Rule 11 before and after amendment or Section 11B cannot affect Section 72 of the Contract Act or the provisions of Limitation Act in such situations.

My answer to the claims for refund broadly falling under the three groups of categories enumerated in paragraph 6 of this judgment is as follows :

> *"Where the levy is unconstitutional - outside the category (I) provisions of the Act or not contemplated by the Act -*
>
> *In such cases, the jurisdiction of the civil courts is not barred. The aggrieved party can invoke Section 72 of the Contract Act, file a suit or a petition under Article 226 of the Constitution and pray for appropriate relief inclusive of refund within the period of limitation provided by the appropriate law. - Dulabhai's Case (supra) - para 32 - clauses (3) and (4)."*
>
> ***9.****The said decision has been followed in the case of Natraj and Venkat Associates v. Asstt. Commissioner reported as* *2010 (17) S.T.R. 3* *(Mad.). In this case also, the question arose was what is the relevant date of commencement of period of limitation for the purpose of Section 11B and it was held that it could be the date of payment. The decision further clarified that the amounts paid under mistaken notion since cannot be considered as duty of excise, therefore, bar of limitation under Section 11B cannot be applied and the limitation on this provision would not come in way of any person claiming refund of the amount which was not his liability. Similar decision has been given by the Division Bench of this Tribunal in the case of Motorola India Ltd. v. CCE reported as* *2006 (206) E.L.T. 90* *(Kar.). The Principal Bench of this Tribunal also in the case of Oriental Insurance Company Ltd. v. CCE reported as 2020 (1) TMI 324 while laying emphasis upon the decision of the Delhi High Court in the case of M/s. National Institute of Public Finance and Policy (supra). has held that if service tax was not leviable but it was paid by mistake the amount has to be refunded to the assessee. It was held that the distinguishing feature for attracting the provision under Section 11B is that the levy should have the colour of validity when it was paid and only consequent upon interpretation of law or adjudication the levy is liable to be ordered as refund when payment was*

effected if it has no colour of legality section 11B does not at all gets attracted."

12. Both these decisions have been relied by the case law referred by the ld. Chartered Accountant for the appellant i.e. **Rattan India Power (supra) and Raj Construction (supra).**

13. In the light of entire above discussion, it is held that there was no reason with the adjudicating authority to invoke section 11 B and the amount was to be refunded notwithstanding anything contrary in the erstwhile law. As it is held that refund claim has wrongly been rejected, the order under challenge is therefore set aside. Appeal stands allowed with consequently relief.

[Order dictated & pronounced in the open Court]

(DR.RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita