CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 55510 of 2023 [SM]

[Arising out of Order-in-Appeal No. 218 (RLM)ST/JPR/2023 dated 25.08.2023 passed by the Commissioner of Central Excise & CGST (Appeals), Jaipur]

M/s. Nahar Singh Contractor **...Appellant**
117/324, Sumer Nagar,
Agarwal Farm, Mansarovar,
Jaipur - 302020

VERSUS

Commissioner of CGST & Central Excise,
Jaipur **...Respondent**
NCR Building, Statue Circle,
Jaipur, Rajasthan - 302005

APPEARANCE:
Ms. Priyanka Goel, Advocate for the Appellant
Shri Rohit Issar, Authorized Representative for the Respondent

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

DATE OF HEARING: 23.04.2024
DATE OF DECISION: **23.08.2024**

FINAL ORDER No. 58088/2024

DR. RACHNA GUPTA

The appellant is engaged in providing Construction of Residential Complex Services and Works Contract Services. The appellant herein had initially filed a refund claim on 20.01.2009 for an amount of Rs.13,14,126/- along with interest paid for the period from April 2007 to September 2008 on the ground that it was paid by him under mistake. Otherwise also, it was the individual residential unit which were constructed by the appellant. The construction activity in that situation is not taxable. However, the said refund claim was proposed to be rejected vide Show Cause Notice No. 09/8121 dated 06.04.2009 alleging that the appellant had constructed residential flats at various sites in Jaipur developed by Rajasthan Housing Board and as such the activity is that of construction of complex services/construction of residential complex, which is taxable. The claim was also proposed to be rejected for being barred by the period of limitation. The proposal of said showcase notice was accepted vide Order-in-Original No. 51/2009 dated 08.12.2009. The appeal against the said order was rejected Vide Order-in-Appeal No. 347/2010 dated 21.09.2010. Being aggrieved, the appeal before this Tribunal was filed.

2. The Tribunal vide Final Order No.55744 -55748/2017 dated 07.08.2017, remanded back the matter to the adjudicating authority directing to decide the issue afresh in the light of observation made by Hon'ble Supreme Court in the case of **Larsen & Toubro reported as 2015 (39) STR 913 (SC),** two other decision in the case of **Raj Construction Co. Vs. CCE & ST, Jaipur-I in Final Order No. 54758/2017 dated 07.07.2017** where the ratio laid down by **Macro Marvel Projects Ltd.- 2008 (12) STR 603 (Tri.Chennai)** as well as **Larsen & Toubro – 2015 (39) STR 913 (SC) was discussed**. Pursuant to the said CESTAT final order the appellant again filed the refund claim on 04.01.2023 in continuation of the previous refund claim dated 20.01.2009. Since the application dated 04.01.2023 was filed after a lapse of period of more than 5 years from the date of the said final order that a fresh Show Cause Notice No. 1999 dated 23.02.2023 was served upon the appellant again proposing the rejection on the refund claim for the same reasons including the ground of limitation. The said proposal has been confirmed vide Order-in-

Original bearing no. 06/2023 dated 03.04.2023. The said order has been confirmed vide Order-in-Appeal No. 218/2023 dated 01.09.2023 also by invoking the bar of "unjust enrichment". Still being aggrieved the appellant is before this Tribunal.

3. We have heard Ms. Priyanka Goel, learned Advocate for the appellant and Shri Rohit Issar, learned Authorized Representative for the department.

4. Learned counsel for the appellant has submitted that the refund claim dated 04.01.2023 is wrongly held to be barred by limitation because the same is the continuation of previous refund claim dated 20.01.2009. The order confirming the claim to be barred by time is therefore liable to be set aside. Learned counsel further submitted that the activity of the appellant is exempted from the payment of service tax. The appellant paid the service tax under the mistake of law, hence the amount deposited is with the department without any authority to retain the same. Refund should have been sanctioned. The order rejecting the same is liable to be satisfied. The activity of appellant does not classify under Construction of Residential Complex Service as appellant executed the work of single independent residential unit and the work does not require any availability of common facilities within the approved layout. The appellant has wrongly been held liable for the amount of service tax as has been prayed to be refunded vide the impugned refund application. Learned counsel has relied upon the decision of Hon'ble Apex Court in the case of **Macro Marvel Projects Ltd. Vs. Commissioner of Service Tax, Chennai reported as 2012 (25) STR J 154 (SC)** by virtue of which individual residential units

are not considered as residential complex or the part thereof. Final order of this Tribunal dated 07.08.2017 had directed the adjudicating authorities below to decide based upon the decision of Hon'ble Apex Court in the case of **Larsen & Toubro (supra).** However, the said decision has not been followed by the authorities below and the activity of appellant is wrongly held as Works Contract Service. With these submissions, learned counsel has prayed for the order under challenge to be set aside and appeal to be allowed.

5. While objecting all the submissions made on behalf of the appellant learned Departmental Representative submitted that this Tribunal vide final order had remanded back the matter for fresh adjudication and that the refund claim was already filed. The matter could have been redecided pursuant to the directions of remand. But the fact still remain is that the fresh refund claim was filed five years later than the final order of this Tribunal. No doubt the refund claim file in January 2023 is in continuation of the refund claim initially filed in January 2009. Hence, cannot be held to have been barred by the period of time when the amount deposited for the period April 2007 to September 2008 was prayed to be refunded vide claim of January 2009. But from the final order dated 07.08.2017, it is clear that the order is silent about the refund claim. The Order-in-Appeal passed pursuant to the said final order has rejected the refund claim on the ground of time bar and that the services rendered by the appellant are taxable services hence present is held to be the case of unjust enrichment.

6. I observe that the second refund application was filed by the appellant after five years from the date of CESTAT order and therefore show cause notice rightly been issued; not submitted any proof that they approached the department to adjudicate the matter in 5.5 years; Further, CESTAT directed to examine availability of common facility within the approval layout, in terms of statutory definition of the work executed the appellant, and therefore, onus of providing the documentary evidence w.r.t. said details was on the claimant within in time limit os Section 11B, which they failed to do. Accordingly, I do not find any infirmity in the order under challenge when refund claim is held to be barred by time.

7. Coming to the another ground of rejection i.e. unjust enrichment, I observe that appellant failed to submit any evidence which show that constructed house is not part of any apartment/township developed by the Rajasthan Housing Board; the work order was inclusive of service tax and the assessee have not produced any evidence that they have refunded the same to the service receiver. Accordingly, no infirmity found in the order under challenge when refund claim is rejected on the ground of unjust enrichment. In light of discussion the findings that services rendered by appellant are taxable also do not suffer any infirmity. The findings in the Order-in-Appeal are sustainable.

8. Further I observe that present is the case of refund of the amount of duty deposited by the assessee alleging that it was deposited under the mistake of law. The issue of refund stands decided by Hon'ble Supreme Court in the case of **ITC Vs CCE,**

Kolkata reported as 2019 (368) ELT 216 , in this judgement the Honourable Supreme Court has summarised as follows:

- *Assessment within its meaning includes 'self-assessment';*
- *A self-assessed bill of entry is an order of assessment Section 47 of Customs Act, 1962 ("the Act");*
- *A self-assessed bill of entry is an appealable order under Section 128 of the Act by 'any person' aggrieved; and*
- *Refund under Section 27 of the Act is not maintainable till self-assessment is modified under Section 128 of the Act or under other relevant provision of the Act.*

Thus, the Court has concluded that there is no change in position post amendment to Sections 17, 27 and 47 of the Act vide Finance Act, 2011 with effect from 8-4-2011 and challenge to the assessment is a must for claim of refund. We feel that this was neither intended nor anticipated by the Central Government. A reading to this judgment will give a feeling that it is a setback to the assessees as it is going to affect the cases where refund claims have been filed without challenge to the assessment by way of an appeal under Section 128 of the Act or without amendment or modification under other relevant provisions of the Act.

9. I also observe that the claim has been rejected on the ground of unjust enrichment also. The appellant has deposited the impugned amount considering it to be his service tax liability. Nothing has been produced by the appellant to show that the burden of the amount deposited has not been passed on. Hence I do not find any infirmity in the findings arrived at by the commissioner (Appeals) on this aspect. In view of the entire above discussion and I being barred by the aforesaid decision being law of land and finding no infirmity in the order under challenge, I uphold

the same. Consequent thereto, the appeal in hand is hereby dismissed.

[Order pronounced in the open court on **23.08.2024**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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