

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. II**

Date of Hearing/Decision: 05.12.2018

Appeal No. ST/50407/2016-CUS (DB)

[Arising out of Order-in-Appeal No. OIA-70-ST-DLH-2015 dated 07/12/2015 passed by Commissioner of Service Tax-DELHI – I]

C.C. Delhi-I

Appellants

Vs.

Shinmaywa Industries India Pvt. Ltd.

Respondent

Appearance:

Shri G.R. Singh, DR for the Appellants

Shri Radha Krishnan, Advocate for the Respondent

CORAM:

Hon'ble Shri Anil Choudhary, Member (Judicial)

Hon'ble Shri C.L. Mahar, Member (Technical)

FINAL ORDER NO. 53376/2018

Per Anil Choudhary:

1. The issue in this appeal is whether the application for refund filed on 26th-27th July, 2013 by the respondent assessee who are registered with the Service Tax department under the category of BAS for the period April, 2012 to June, 2012, under Rule 5 of CCR read with Notification No. 5/1006-CE NT, has been filed in time within limitation.
2. The appellant is an exporter of service. It appeared to Revenue that the relevant date (under section 11B of Central Excise Act) in case of export of service is the date of realisation of export proceeds, which in the instant case is 30th April, 2012 and therefore, the refund claim was barred by limitation being filed after one year. Accordingly, vide the Order-in-Original

dated 29th August, 2014 the refund claim was rejected as the same was filed beyond a period of one year from the relevant date, as refund claim is to be filed within one year from the relevant date as required under Section 11B of Central Excise Act read with clause 6 of the said Notification No. 5/2006-CE.

3. Being aggrieved the assessee filed appeal before the Ld. Commissioner (Appeal). Who took notice of the following clause in the service agreement between the respondent assessee and its counterpart ShinMaywa Industries Ltd. Yokohama Japan reads as follows:-

"The respondent shall have right to claim the fee for the continuous services being rendered by them by issuing an invoice any time during a quarter in accordance with the terms in the purchase order, however, the services for a quarter shall be construed to be executed in full only on the last day of the last month of a quarter. In case the invoice for a quarter is issued by respondent in the payment of the same to be done by ShinMaywa Industries Ltd. Yokohama Japan and the services agreement is terminated before the end of the quarter, respondent shall be life to refund the proportionate fee for the remaining period of the quarter from the date of such termination."

4. The Ld. Commissioner (Appeals) observed that from the aforementioned clause-

"It can easily be construed that in the given case, as the quarter in question is April 2012- June 2012, therefore, the last day of the said quarter i.e. 30.06.2012 will be treated as the date on which the services will be construed as executed in full. Moreover, as

discussed in above parts, benefit of Input Service Credit has not been confined to quarterly filing of refund applications in respect of Input Services used in the rendering of Output Services which are eventually exported, the limitation bar has to be seen in the context of the facts of the case which suggest that in the case of export of services the period of one year is to be reckoned from the date on which the said services are presumed to be received. In the given scenario, as the date of filing of the instant refund claim is 26/27.06.2013 the same falls within one year from the date on which services are consummated. As such the said is held to be filed on time and I order for the sanctioning of refund of Rs. 3,95,485/- to the appellants.

In view of the foregoing discussions, the impugned order is set aside and the appeal is allowed in above terms."

5. Being aggrieved Revenue have filed the present appeal on the ground that Ld. Commissioner have erred in relying on the Ruling of this Tribunal in CCE-Pune-I V/s M/s Affinity Express India (P) Ltd. reported at 2015 (37) STR 321 (Tri-Mumbai) as the facts are quite different. In Affinity Express this Tribunal have concluded that in case of Service Tax the relevant date would be the date of export or when invoice is raised. The Commissioner have erred in placing reliance upon the agreement between the parties to decide the date of export. Private agreement cannot be relied to determine the date of export. The second ground taken is- even if it is assumed that the Order-in-Appeal is legal and proper, the Ld. Commissioner (Appeals) have erred in ignoring the fact that the refund claim could be rejected, as the same was

found to be barred by limitation, without going into merits of the case i.e. without verifying the other conditions mentioned in Notification No. 5/2006-CE, have also been met with.

6. Heard the parties and perused the records.
7. We hold that under the provisions the export of Service is completed only when the following two conditions are satisfied-
 - a. Services are provided from India and received outside India and
 - b. Payment for the same is received in India in convertible foreign exchange.
8. Both the conditions must be satisfied to treat a particular service as export of service. In the instant case the service rendered by the respondent was completed only on 30th June, 2012. Moreover the amount received by them on 30th April, 2012 was by way of an advance. The said invoice related to period April to June, 2012. Hence the relevant date has to be taken only from the date of completion of service not from the date of receipt of payment which is prior to the date of completion of service. As regard the second ground i.e. allowing the refund claim by the Commissioner (Appeals), without going to be other aspects, we find the said ground to be frivolous and against public policy as well as against the provisions of the Act, read with Rules there under. For one refund claim there cannot be more than one show cause notice and one adjudication order. It is not permitted to Revenue to reject the refund claim on one ground and when the said ground is held unsustainable, to raise the hue and cry that they are also other grounds on which the refund may be rejected. This ground is also rejected.

Accordingly the appeal filed by Revenue is rejected and the order-in- appeal is upheld.

9. We further direct the adjudicating authority to grant the refund within a period of 45 days from the date of receipt of the copy of this order along with interest as per rules.

(Operative part of the order pronounced in the open court)

(C. L. Mahar)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

Rekha