

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT – IV

Service Tax Appeal Nos. ST/51876 & 51927/2018 [SM]

[Arising out of Order-in-Appeal No. 291-292(SM)ST/JPR/2018 dated 13.04.2018 passed by the Commissioner (Appeals), CE & CGST, Jaipur]

Argus Marketing

...Appellant

Vs.

C.C.E. & S.T., Jaipur-I

...Respondent

Present for the Appellant : Mr. Alok Kothari, Advocate

Present for the Respondent: Ms. Tamana Alam &
Mr. P.R. Gupta, DRs

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing: 29.11.2018

Pronounced on: 19.12.2018

FINAL ORDER No. 53419-53420 / 2018

PER: RACHNA GUPTA

Present is an Appeal against the Order of Commissioner(Appeals) bearing No. 291-292 dated 03.04.2018. The facts relevant for the impugned adjudication are that the appellant is engaged in providing Business Auxiliary Services and are the holder of service tax registration accordingly.

2. Appellant filed a refund claim of service tax of Rs. 4,73,771/- on 27.03.2017 under Section 11B of the Central Excise Act, 1944 (as made applicable in service tax matters by virtue of Section 83 of Finance Act, 1944) on the ground that Commissioner(Appeals) vide Order-in-Appeal No. 182/2010 dated 23/29.04.2010 have set aside the service tax demand of Rs. 9,98,741/- as was otherwise confirmed vide Order-in-Original No. 18/2009 dated 13/17.08.2009. Aggrieved with the said Order-in-Appeal, the Department preferred

an Appeal before this Tribunal. The same was dismissed vide Final Order No. ST/A/54713-54715/2016 dated 21.10.2016 vide SCN No. 3306 dated 09.05.2017.

3. Department has proposed to reject the said refund claim for want of fulfilment of the conditions laid down under Section 11B of CEA. The said proposal was initially confirmed by Order No.43 dated 19.06.2017 as was passed by Assistant Commissioner. IN an Appeal thereof, Commissioner(Appeals) vide the Order under challenged has rejected the Appeal hereby confirming the rejection of the refund claim. Resultantly, the Appeal is before this Tribunal.

4. I have heard Mr. Alok Kothari, Ld. Advocate for the appellant and Ms. Tamana Alam, Ld. DR for the Department.

5. It is submitted that the authority below have rejected the refund on the ground of limitation and on the ground of non submission of the documents evidencing the payment of service tax into the credit of the Government account. The said findings are alleged to be absolutely wrong. It is submitted that service tax amounting to Rs. 1,68,647/- was deposited during the adjudication of the case as is also acknowledged in para 5.15 of the O-I-O dated 13/17.08.2009. Service tax amount of Rs. 3,05,124/- was allowed under O-I-A dated 23/29.04.2010 by the Commissioner(Appeals). Hence, the appellant is entitled for the refund as claimed herein i.e. for Rs. 4,73,771/-. It is submitted that before the appellant could file the said refund claim after receiving the said O-I-A that the Department had filed an Appeal before this Tribunal which was decided on 21.10.2016. The refund claim filed on 27.03.2017 is very much within one year of the said Order, hence no question arises for it to be time barred. With respect to non submission of documents, it is submitted that all the documents have been

discussed in detail in the previous O-I-O as well as O-I-A. No question of submitting them afresh at all arises. Otherwise also, it is nothing beyond a procedural lapse.

6. While rebutting these arguments and justifying the Order under challenge it is submitted that the refund in question admittedly arises due to Commissioner(Appeals) Order dated 29.04.2010. It would have been filed within one year from the said date. The refund as filed on 27.03.2017 is beyond more than six years of the relevant date. Hence, has rightly been rejected. Appeal is accordingly prayed to be dismissed.

7. After hearing both the parties, I am of the opinion as follows:

The narrow compass of the impugned adjudication is as to whether the refund claim filed on 27.03.2017 has met the time limit of one year as prescribed under Section 11B of Central Excise Act.

The Section reads as follows:

"(1) Any person claiming refund of any duty of excise may make an application for refund of 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 in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty had not been passed on by him to any other person: Provided that where an applicant for refund has been made before the commencement of the Central Excise and Customs Laws(Amendment) Act, 1991 (40 of 1991), such application shall be deemed to have been made under this sub-section as amended by the act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act: Provided further that the limitation of one year shall not apply where any duty has been paid under protest."

The amount which has been paid by the appellant during the course of adjudication was paid in the form of tax. The amount which has been dropped by the Commissioner(Appeals) vide the Order of April 2010 was the proposed demand of service tax since the appellant has held to not to be liable for the said deposit. The

only provision for seeking the refund in the Act is Section 11B. Hence, the said Section is applicable irrespective the amount was paid by mistake or under protest as apparent from the above provision. I draw my support from the decision of Hon'ble Apex Court in the case of **Mafatlal Industries Limited Vs. Union of India 1997 (89) E.L.T. 247 (S.C.)** as has been relied upon by the Larger Bench of this Tribunal in the case **Veer Overseas Ltd. Vs. Commissioner of Central Excise, Panchkula 2018 (GSTL) 59** wherein it was held that the for entertaining the refund claim of the amount paid by mistake, the time limit prescribed under Section 11B of Central Excise Act, 1944 is not applicable.

8. Now coming to the issue whether the refund claim in question is within one year of the time limit as prescribed under 11B. Perusal of above provision shows that one year has to reckon from the relevant date. Sub-clause B of the said Section itself defines relevant date. Sub-clause (ec) seems applicable to the present case. It reads as follows:

"(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;"

Admittedly, the duty made refundable vide the Order of Commissioner(Appeals) dated 23/29.04.2010. Since the Order was decided in favour of the assessee/appellant herein, the Department had a right to go into Appeal, for which a period of two months from the date of communication of Order extendable to another a month was available to the aggrieved party. However, refund from the said date could have been filed till April 2011. But it is apparent and admitted on record that before the period of said one year could expire, the Department being aggrieved of the said Order, had pursued an Appeal before the CESTAT, New Delhi. It is further

apparent and admitted fact that the Appeal was decided by this Tribunal vide the Order dated 21.10.2016 in favour of the appellant against the Department. It is settled law that after the filing of Appeal, the status quo had to be maintained. Resultantly, the appellant was not supposed to file the refund claim during the pendency of the Appeal. It stands clear that duty became finally refundable to the appellant only after the decision of the CESTAT and as per above said sub clause (ec) of Clause B, the claim could have been filed within one year form the date of this Tribunal Order i.e. till October 2017. The claim has been filed in March 2017. The same is therefore held to be well within the period of limitation.

9. Further, non submission of documents has also been wrongly taken as a ground for rejecting the refund claim as the service tax to the tune of Rs. 1,68,647/- was predeposited and the service tax to the tune of Rs. 3,05,124/- which was not initially admitted by the adjudicating authority but was subsequently allowed by Commissioner(Appeals). Thus, no more evidence, to my opinion, at all is required about the proof of payment of service tax as claimed vide the impugned refund claim. The rejection on this ground is also not sustainable. In view of entire above adjudication, the Order of Commissioner(Appeals) is hereby set aside. Appeal stands allowed. Consequential benefit to follow.

[Pronounced in the open Court on 19.12.2018]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

D.J.