

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Appeal Nos.ST/143/2009 to ST/146/2009

(Arising out of Order-in-Appeal No.30-33/ST/B-I/2009 dated 30.03.2009 passed by the Commissioner (Appeals) of Customs, Central Excise & Service Tax, Bhubaneswar)

1. M/s Z Konark
2. M/s KZK Developers
3. M/s Neelachal Build-Tech & Resorts Pvt Ltd.
4. M/s Kehsari Tritan Developers Pvt Ltd.

..... APPELLANT(S)

Versus

Commissioner of Central Excise & Service Tax, BBSR-I

...RESPONDENT (S)

APPEARANCE

Shri B.K.Halwai, CA for the Appellant

Shri K.Choudhari, Suptd. (AR) for the respondent.

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER

Hon'ble SHRI V.Padmanabhan, Member (Technical)

Date of Hearing/Decision : 29.10.2018

ORDER NO.FO/76835-76838/2018

Per Bench :

The present appeals are against the Order-in-Appeal No.30-33/ST/B-I/2009 dated 30.03.2009. All the appellants were engaged in the activity of Construction of Residential Complex. The dispute covers the period 2005-2006 and 2006-2007. During this period the appellants received advances from prospective buyers who were interested in purchasing residential apartments in the projects under construction. Department, initially was of the view that appellants will be liable to payment of service tax on the advances received from the customers under the category of 'Construction of Residential Complex'. The appellants were persuaded to make payment of

service tax as contended by the revenue. Subsequently, w.e.f. 01.07.2010, the definition of 'Construction of Complex Service' underwent an amendment by introduction of explanation in Section 65 (105) (zzzh). The explanation had the effect of restricting the liability for service tax only in those cases where amounts have been received by the person constructing the residential complex, prior to the grant of completion certificate by the appropriate authority.

2. By taking the view that no service tax is liable to be paid by them, the appellants filed refund claims before the original authority. These refund claims were rejected by the original authority. Such rejection of refund claims was also upheld by the Commissioner (Appeals). This order has been challenged in the present appeals.

3. On behalf of the appellants we heard Shri Vivek Halwai, CA and on behalf of revenue we heard Shri K.Choudhary, SUptd.(AR).

4. Ld. CA submitted that the Commissioner (Appeals) in the impugned order has upheld the rejection of all the refund claims on the ground of time bar. He contended that prior to the amendment inserted w.e.f 01.07.2010, no liability for service tax would arise against the appellants. He submitted that this issue stands clarified by the CBEC vide their Clarification dated 29.01.2009 even before the insertion of explanation. The CBEC has clarified that any activity carried out by a builder prior to the sale of the constructed apartment would be in nature of self service. He submitted that in view of the above clarification, the amount paid by the appellants cannot be considered to have the character of service tax and the same is to be refunded to them without reference to the time limits specified in Section 11B as has been held by the Hon'ble Madras High Court in the case of 3E

Infotech vs. Commissioner of Central Excise, [2018(7) TMI 276 Madras High Court].

5. Ld. Consultant further submitted that even though the refund claims have been filed beyond the period of one year from the date of payment of duty, such duty deposits have been made under the compulsion of the department and are to be considered as paid under protest. The Commissioner (Appeals) has referred to the letter dated 14.09.2006 filed by the appellants by way of protest. Specifically they brought to our notice the letter dated 28.03.2006 filed by one of the appellants M/s Z Konark before the jurisdictional Commissioner recording protest. He claimed that other appellants have also filed similar letters of protest.

Finally, he submitted that the appellants will be eligible for grant of refunds.

6. Ld. DR for the revenue specifically referred to the findings of the Ld. Commissioner (Appeals) to the effect that to consider duty to have been paid under protest, the protest is to coincide with the tax payment. He submitted that on the basis of the documents submitted by the appellants, such specific recording of protest by all the appellants is not evident. He also referred to the order of the original authority rejecting the refund claims in which he has observed that the appellants have not submitted the relevant contracts for verification of the nature of activities carried out. Hence he submits that even on merit claims are not sustainable.

7. Heard both sides and perused the appeal records.

8. The appellants, during the period under dispute, have been engaged in the activity of construction of residential complex. There were doubts in the field at the relevant time about the liability for payment of service tax in

respect of the advances received by such builders for construction of residential apartments. Finally with the insertion w.e.f. 01.07.2010 of Explanation in the definition of Section 65(105) (zzzh), the matter was laid to rest with the conclusion that any amount received by the builders prior to the issuance of completion certificate will be liable to payment of service tax under the category of construction of residential complex. Admittedly, the dispute in the present case is prior to the date of insertion of explanation. Hence, on merit the appellants were not liable for payment of service tax.

7. The refund claims stand rejected mainly on the ground of time bar in terms of Section 11B. The section provides that refund claims are to be filed within one year from the date of payment of tax. Such strict time limits will not be applicable in case the payment of tax is made under protest. The refund claims under dispute have been filed beyond the period of one year and have been held to be time barred. But the appellants submit that they were forcefully asked to pay the service tax which were not liable to be paid. They have also referred to the letter of protest dated 28.03.2006 in respect of one of the appellants. Any letter of protest filed by the other appellants is not evident from the record before us.

8. In order to decide whether the appellant's claim for refund will be hit by time bar under Section 11B, it is required to be verified from records whether any letter of protest has been filed by the appellants with the jurisdictional authorities and obtained acknowledgement. During the course of argument, the appellants have brought to our notice only the letter dated 10.03.2006 filed by one of the appellants M/s Z Konark. It has been claimed that similar letter of protest has been filed by other appellants also. In this connection we are of the view that the impugned order is required to be set

aside and the matter remanded to the original authority. Original Authority will verify the records whether any letter of protest has been filed by these appellants either before him or before jurisdictional Commissioner. In such a case the refund claim will not be held as time bar. We make it clear that the appellants will be entitled to the refunds on merit.

8. In the result, we set aside the impugned order and remand the matter to the original authority.

(Dictated and pronounced in the open court)

S/d.

(P. K. CHOWDHARY)
MEMBER (JUDICIAL)

S/d.

(V.Padmanabhan)
MEMBER (TECHNICAL)