IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.77132 of 2019

(Arising out of Order-in-Appeal No.158/HWH/CE/2019-20 dated 30.07.2019 passed by Commissioner (Appeals II) of Central Excise, Kolkata)

M/s GKW Limited
Central Plaza, 2/6, Sarat Bose Road, Office Space No.406, 4th Floor, Kolkata-700020

Appellant

VERSUS

Commissioner of CGST & Excise, Howrah
15/1, Strand Road, Kolkata-700001

Respondent

APPERANCE :

Ms.Leena Rachh & Mr.Dheeraj Agarwal, both Chartered Accountants for the Appellant
Shri P.Das, Authorized Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)

FINAL ORDER NO.76273/2024

DATE OF HEARING : 11.07.2024
DATE OF DECISION : 11.07.2024

Per Ashok Jindal :

The appellant is in appeal against the impugned order wherein the refund claim of service tax paid by them, was denied.

2. The facts of the case are that the appellant is engaged in the business of immovable property and during the financial year, 2015, the appellant booked 33 flats with M/s Riverbank Developers Private Limited, accordingly, made a part payment of Rs.9,98,94,000/- and also service tax amounting to Rs.35,81502/-. The payment was made on 30.11.2015 and the service tax was paid on 16.12.2015. Subsequently, the above said flats booking was cancelled during the period September, 2017 to January, 2018. Accordingly, the part payment of

Rs.9,98,94,000/, was returned to the appellant by M/s Riverbank Developers Private Limited, but could not return the amount of Rs.35,81,502/- paid by the appellant as service tax to them on the ground that the same has been deposited with the Department. It was also stated that as in GST Regime is not able to avail credit the same, therefore, they are directed the appellant to file refund claim before the Service Tax Department as the appellant has borne service tax paid by them. Thereafter, the appellant filed refund application within one year from the date of cancellation of booking of flats. The said refund claim was initially rejected by the ld.Adjudicating Authority, which was affirmed by the ld.Commissioner (Appeals) holding that the refund claim has been filed beyond the time limit prescribed under 11B of the Central Excise Act, 1944 and the same has been filed after one year from the payment of service tax. Therefore, the refund is not entitled to the appellant as the same is barred by limitation. Aggrieved from the said order, the appellant is before me.

3. The ld.Counsel for the appellant submits that as the appellant has borne component of service tax and have not taken any cenvat credit of service tax paid by the appellant on the amount for booking of flats, which has ultimately been cancelled on 1st September, 2017. Therefore, the appellant has borne the component of service tax paid by them to the promoter, namely, M/s Riverbank Developers Private Limited, which was paid on 16.12.2015 and they have filed refund claim on 25.06.2018, which is within one year from the date of cancellation of flats, therefore, they are entitled to claim the refund as held by this Tribunal in the case of M/s Grey Orange India Private

Limited Vs. Principal Commissioner, CGST, Gurugram reported in 2021 (12) TMI 1232-CESTAT, Chandigarh to the effect that they have not taken the cenvat credit and have borne the component of service tax paid by them. The appellant has furnished the Chartered Accountant's Certificate certifying the above said facts. In that circumstances, she prays that the refund claim be allowed.

4. On the other hand, the ld.A.R. for the Revenue, opposes the refund claim to the appellant on the ground that initially, they have paid the service tax on 16.12.2015, whereas the refund claim was filed on 25.06.2018, which is barred by limitation as per Section 11B of the Act, i.e. beyond the period from the date of payment of service tax. It is therefore, contented that the appellant has paid the amount to the promoter, M/s Riverbank Developers Private Limited, who has paid the service tax to the Department. Therefore, the said promoter is entitled to claim the refund of service tax paid by them.

5. Heard both the parties and considered the submissions.

6. I find that in that case, the facts are not in dispute that the appellant paid advance towards purchase of 33 Flats in the year, November-December, 2015 and also paid the service tax on advance. Later on, the booking of the said flats was cancelled on September, 2017 and the builder has returned the amount of advance payment made and did not refund the payment of service tax to the appellant as the builders have no provisions to claim refund of service tax paid by them during the impugned period as the service tax was changed to GST Regime, therefore, the appellant has borne the component of service tax paid thereof. In that circumstances, the appellant has borne

the component of service tax and is entitled to claim the refund thereof. Accordingly, I hold that the appellant has rightly filed the refund claim. Therefore, I find that the refund claim has been filed within one year from the date of cancellation of flats. The cause of action arose in this case at the time of cancellation of flats. Therefore, the time limit under Section 11B shall start from the date of cancellation of flats and admittedly the appellant has filed the refund claim within one year thereof. In that circumstances, the refund claim is not barred by limitation.

7. We further take note of the fact that the appellant has not taken cenvat credit of the service tax paid by them and the same has been shown as deemed receivable from the Revenue. In that circumstances, the appellant is entitled for refund claim.

8. With these observations, I set aside the impugned order and allow the appeal with consequential relief, if any.

(Dictated and pronounced in the open court)

(Ashok Jindal)
Member (Judicial)

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