

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

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 76503 of 2024

(Arising out of Order-In-Appeal No. 64/ST/BBSR-GST/2021 dated 25.11.2021 passed by Commissioner (Appeals), GST, Central Excise & Customs, Bhubaneswar)

M/s. Z. Konark

(Plot No. M-4/34, Acharya Vihar, Bhubaneswar-751013, Odisha)

Appellant

VERSUS

Commr. of CGST & Central Excise, BBSR

(C. R. Building, Rajaswa Vihar, Bhubaneswar, Odisha-751002)

Respondent

APPEARANCE :

Mrs Shreya Mundhra & Sreemoyee Gangopadhyay, both Advocates
for the Appellant

Mr. S. K. Dikshit, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.75009/2025

Date of Hearing : 18 December 2024

Date of Decision: : 07/01/2025

PER R. MURALIDHAR:

The appellant is engaged in the business of construction of residential buildings and subsequent sale thereof. No Service Tax was being paid by them since they held a Bonafide belief that no Service Tax is payable on such activities. The Department viewed that the service was liable to tax during the impugned period. In view of pressure from the Department, the Appellant paid the duty of Rs. 25,33,720/- (Rs. 17,28,454/- on 30.03.2006 and Rs.8,05,266/- on 05.07.2006). The Appellant had also submitted the protest letter dated 28.03.2006 wherein it is clearly mentioned that, the payment

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was made under protest. Finally, the issue got clarified that the Service Tax is payable from 1.7.2010 only.

2. The appellants filed their refund claim for Rs.25,33,720 on 22.11.2007. The Revenue issued SCN on 14.01.2008, seeking to know as to why the refund claim should not be rejected. After due process vide OIO dated 14.11.2008, the refund claim was rejected. Being aggrieved the appellants filed their appeal before the Commissioner (Appeals), who upheld the OIO and dismissed the appeal filed by the appellant. Against this OIA, the appellant filed their appeal before the Tribunal, which vide Final Order No. FO/76835-76838/2018 dated 29-10-2018, held that no Service Tax was required to be paid during the impugned period and remanded the matter back to the Adjudicating authority to verify the claim of the appellant about making their payment 'Under Protest'.

3. In pursuance to the above mentioned CESTAT Order, the Appellant vide letter dated 01.02.2019 has submitted an application along with acknowledged original copy of protest letter dated 28.03.2006 and requested the refund to be granted. Out of the total refund of Rs. 25,33,720/-, the Asst Commissioner granted the refund of Rs. 17,28,454. In respect of the balance amount of Rs. 8,05,266/- which was paid vide TR-06 challan No. 002, he has rejected the claim on the ground that the same was not paid 'under protest', since no such letter has been filed by the Appellant. Being aggrieved, the appellants filed their appeal before the Commissioner (Appeals), who has

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dismissed their appeal. Being aggrieved by the impugned Order dismissing the appellant's claim towards refund of Rs.8,05,266/-, the appellant is before the Tribunal.

4. The Ld Counsel appearing for the appellant makes the following submissions :

A. ONCE A PROTEST LETTER IS FILED, ALL SUBSEQUENT PAYMENTS FOR THE SAME ISSUE SHALL DEEMED TO BE PAID UNDER THE COVER OF THE SAID PROTEST LETTER.

(1) The Appellant upon insistence of the Department had paid the amount as directed by them. The Appellant however, while making the first payment had clearly stated that the amount has been paid under protest as the Appellant is of the view that no tax was leviable on the transaction of sale or purchase of flat.

(2) In the present case, the Ld. Assistant Commissioner (Adjudicating Authority) has allowed the refund of first payment (i.e. Rs. 17,28,454/-) on the ground that the Appellant has duly filed letter of protest for the same. Whereas, he has rejected the refund of second payment of Rs. 8,05,266/- on the ground that the said second payment has not been made with the support of protest letter.

(3) The Appellant submits that the Ld. Commissioner (Appeals) has failed to appreciate the submission/compliances (in-spite of being noted on record) of the Appellant, wherein they have clearly demonstrated that one letter itself is sufficient in order to state the intention of the Appellant for the matter that they are paying tax under protest.

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(4) The Appellant further submits that the broader principal for protest is nothing but the intention of the Assessee whether they are accepting the liability as tax or only paying the same without admitting the liability. The Authority has failed to test this on merits.

(5) It is further submitted that, the Appellant, in his first letter dated 28th March 2006 (i.e. from the very beginning), has clearly stated that they are not admitting the tax liability and also stated that they are paying the tax under protest. Thus, it is submitted that the first filing of protest letter continues till the period of dispute and whatever amount has been paid after filing of the first protest letter, shall be covered under the said protest letter.

(6) The Appellant again submits that they have already filed the protest letter at the time or before making the first deposit. Thus, once a protest letter is filed, all subsequent payment for the similar matter shall be deemed to be treated as payment made under protest and shall be covered under the first letter of protest filed. Thus, the Appellant is not required to file protest letter again and again as one protest letter is sufficient for subsequent payments also.

(7) To substantiate the above said proposition, the Appellant relies upon the case of ***Niphad SSK Ltd. V. CCE, Nashik 2017 (358) E.L.T. 738 (Tri. – Mumbai) point No. 4*** wherein it was observed by the Hon'ble Tribunal that once the

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letter under protest have been submitted, the subsequent payment made are also covered under the protest letter filed.

(8) On the basis of aforesaid relied upon judicial pronouncement, the Appellant submits that, since one protest letter has already been filed in due course, the rejection of refund of Rs. 8,05,266/- for want of protest letter again is ex-facie arbitrary and not tenable. Hence, subsequent payment after submission of letter of protest is itself a sufficient compliance. Accordingly, refund claim shall not be hit by time barred provision. Therefore, the impugned Order is liable to set aside on this ground alone.

B. WITHOUT PREJUDICE TO OTHER GROUNDS, WHEN THE AMOUNT PAID ON ACCOUNT OF ANY INVESTIGATION/AUDIT AND HAS BEEN CONTESTED FOR ITS LEVY, THE PAYMENT HAS TO BE TREATED AS PAID UNDER PROTEST.

(1) It is settled position of law that the service tax was not leviable during the material period of time i.e. when the amount has been recovered from the Appellant. After the said recovery, the Appellant, vide letter dated 28.03.2006, has specifically stated that the payment has been made under protest.

(2) In this regard the Appellant relies on the case of ***Indian Cement Ltd. V. Collector of Central Excise (SC) reported at 1989 AIR 1496, 1989 SCR (2) 715, 1989 (41) ELT 358*** wherein the Hon'ble Apex court has held that, where an

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assessee is paying the tax without accepting it then the same is nothing but payment made under protest.

5. The Appellant further relies on the cases of ***CCE, Aurangabad v. Klasspak Pvt. Ltd. reported at 2005 (179) E.L.T. 365 (Tri.-Mumbai)***, wherein it has been held that when matter is under litigation, payment of duty made is deemed to be payment under protest, even though there is no express mention of payment having been made under protest and in such circumstances, the limitation period u/S 11B for its refund would not be applicable.

6. Further, in the case of ***Opel Alloys Pvt. Ltd. Vs. CCE, Ghaziabad reported at 2010 (249) ELT 408***, the Hon'ble Bench has observed that:

“3.2. The refund claim has arisen when the Commissioner's order was set aside by the Tribunal vide final order dated 28-10-04. The Tribunal in the case of Surbhi Enterprise v. CCE, Ahmedabad (supra) has held that when the duty paid during investigation has been contested throughout from the original stage, its payment has to be treated as under protest. Same view has been taken by the Tribunal in the case of G.S. Radiators Ltd. v. CCE, Ludhiana reported in 2005 (179) [E.L.T.](#) 222 (Tri.-Del.) and Laxmi Board & Paper Mills Ltd. v. CCE, Mumbai reported in 2007 (208) [E.L.T.](#) 384 (Tri.-Mumbai). Hon'ble Supreme Court, in Para 83 of its judgment in case of

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Mafatlal Industries Ltd. v. UOI reported in 1997 (89) E.L.T. - 247 (S.C.) has observed that - “when a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest”. Relying on these observations of Hon’ble Supreme Court, the Tribunal in the cases of CC (Prev.), Jamnagar v. Continental Petroleums Ltd., reported in 2009 (234) [E.L.T.](#) 333 (Tri.-Ahmd.) and CCE, Aurangabad v. Klasspak Pvt. Ltd. reported in 2005 (179) [E.L.T.](#) 365 (Tri.-Mumbai), has held that when matter is under litigation, payment of duty made is deemed to be payment under protest, even though there is no express mention of payment having been made under protest. Thus in this case, the debit of the disputed amount on 4-1-05 in RG 23A Pt. II account has to be treated as having been made under protest and hence the limitation period under Section 11B for its refund would not be applicable.”

7. On the basis of above-mentioned judicial pronouncements, the Appellant submits that, the observation based on which the Ld. Commissioner (Appeals) has rejected the refund claim of Rs. 8,05,266/- is clearly against the settled position of law. Hence, the entire Order fails on this score alone. The impugned Order is thus liable to be set aside.

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(C) SECTION 11B IS NOT APPLICABLE IN THE INSTANT CASE AS NO TAX WAS DUE TO THE GOVERNMENT. THE ENTIRE AMOUNT PAID IS IN THE NATURE OF DEPOSIT. WHEREAS, THE PROVISION OF SECTION 11B APPLIES ONLY WHEN THE TAXES HAVE BEEN COLLECTED UNDER AN AUTHORITY OF LAW.

(1) In this regard, reliance is placed in the case of ***M/s. ASL Builders Pvt. Ltd. Vs. Comm. Of Central GST & CX reported at 2020(1) TMI 431***, wherein the ***Hon'ble CESTAT Kolkata*** has held that, when the amount paid to the government exchequer does not have the character of service tax, then the same has to be refunded without reference to the time limits specified in Section 11B of the Central Excise Act, 1944.

(2) Further, reliance is placed on the case of ***UOI Vs. ITC Limited reported at 1993 (67) E.L.T. 3 (S.C.)*** wherein the Hon'ble Apex Court has held that, where the duty has been collected without the authority of law, bar of limitation as provided for u/S 11 B cannot be applied.

(D) The appellants have deposited the amount in the course of investigation. Such amount was not at all required to be paid. Therefore, once it is held that the appellant is eligible for refund of this amount, the appellant should also be granted interest in terms of Section 11BB of the CEA, treating the date of filing of the refund claim for this purpose. They rely on the case law of

Service Tax Appeal No. 76503 of 2024***Ranbaxy Laboratories Ltd. Vs. UOI reported at 2011
(273) E.L.T 3 (S.C.)***

8. On the basis of the above submissions, the Ld Counsel prays that the impugned order may be set aside and they may be granted the refund along with consequential relief in terms of interest on such refund.

9. The Ld. AR, appearing for the Revenue, reiterates the findings of the lower authorities and submits that in the absence of any specific 'under protest' letter, the amount paid by the appellant has to be treated as normal payment made. In such a case, the time limit specified under Section 11B would be applicable. Hence, he justifies the rejection of the refund by the lower authorities.

10. Heard both sides and perused the appeal papers and documentary evidence placed before us.

11. The issue as to whether Service Tax is payable or not on Construction of Residential Complex service was under litigation for quite some time, right from its inception. In the present case, there is nothing to indicate that the Appellants were paying the Service Tax in the normal course. When the enquiries were made, they made two payments of Rs.17,28,454/- on 30.03.2006 and Rs.8,05,266/- on 05.07.2006, filing their under protest letter dated 28.03.2006. Both the payments have been made after this protest letter. No doubt the letter dated 28.03.2006, specifically mentions the payment of

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Rs.17,28,454 as being done 'under protest'. But the fact remains that the subsequent payment was made only on 05.07.2006. Just because of the fact that a separate letter towards under protest was not filed, the Dept cannot take a stand that the second payment was paid voluntarily in the normal course. The Dept. has not come out with any evidence to the effect that this payment was made in the normal course not on account of the investigation taken up by the Revenue. The letter filed towards 'under protest', is to be taken as the assessee's view. Filing such a letter clarifies that they are not subscribing to the view of the Revenue that Service Tax is payable. Such letter would have to taken as the one which pertains to all the payments made subsequently, unless the Revenue comes out any evidence to the contrary to the effect that subsequent payment has been made voluntary and is not made under protest. Such evidence is not forthcoming in the Revenue's case here

12. We find that in the case of ***Niphad SSK Ltd. V. CCE, Nashik 2017 (358) E.L.T. 738 (Tri. – Mumbai)***, the Tribunal has held as under :

“The total refund claim of 39,14,616/- pertaining to the period August, 1999 to February, 2002. The letter of protest first time was submitted by the appellant on 2-8-2000 therefore reversal made on or after 2-8-2000 till February, 2002 is covered made under protest. Whereas the reversal for the period August, 99 to 1-8-2002 cannot be treated under protest, therefore the reversal for the period August, 1999 to 1-8-2000 is clearly time-barred as no protest was lodged by

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the appellant. The reversal made from 2-8-2000 to February, 2002 is under protest and cannot be rejected on time bar, therefore the refund to the extent of reversal for the period 2-8-2000 to 2002, is allowed.

13. We find that the Tribunal has held that once the 'Under Protest' letter is filed, it would be applicable for the future payments also. Applying the ratio of this case law, we hold that the 'Under Protest' letter filed at the time of the first payment also holds good for the subsequent payments made. The first letter clearly shows the view of the appellant that they are not in agreement with the stand taken by the Revenue.

14. It is also an admitted fact that the amount in question has been paid by the appellant when the matter was under investigation. The Hon'ble Apex Court in the case of ***Indian Cement Ltd. V. Collector of Central Excise - 1989 (41) ELT 358*** has held as under :

“we gave our anxious considerations to the rival submissions. A perusal of the letter dated June 11, 1947 clearly shows that all possible contentions could be raised against the levy of duty on the value of packing materials were issued. If this could not be said to a protest one fails to understand what else it could be. It does not require much time to analyse the contents of the letter. An ordinary reading with common sense will reveal to anybody that the appellant was not accepting the liability without protest. We have no hesitation to hold that the letter was in the nature of protest. That being the position, the question of limitation does not arise for the refund of the duty.”

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15. We find that applying the ratio of the above case, even on this count, the appellant cannot be denied the refund of the second amount of Rs.8,05,266/-.

16. Accordingly, we set aside the impugned order and allow the appeal to this extent.

17. The appellant has also claimed that they should be granted the interest on the refund in terms of Section 11BB.

18. In the appellant's own case, in respect of already granted refund of Rs. Rs. 17,28,454, their appeal was before this Bench. Relying on the judgement of the Hon'ble Supreme Court in the case of **Ranbaxy Laboratories Ltd. Vs. UOI reported at 2011 (273) E.L.T 3 (S.C.)**, **Atmiya Engineering and Plastics Vs CCE & ST Vadodara** , vide **FINAL ORDER NO. A/ 10311 /2022** and **Tengapani Tea Estate, M/s. Betjan Tea Estate Vs. Commissioner of CGST & CX, Dibrugarh Commissionerate - 2021 (9) TMI 22**, this Bench has held as under :

13. Therefore, following the ratio laid down in the above case laws, we hold that the appellant is eligible for the interest taking the refund claim date as the base. The appellant has filed the refund claim on 22.11.2007. Hence after considering the period of 3 month's for processing of this application, the interest would be payable from 22.02.2008 till the date on which the refund has been paid to them.

19. In the present case, the Revenue has not pointed out any factual difference from the above case. Therefore, we hold that the appellant would be eligible for interest from 3 months from the date of their refund claim letter till the refund is granted.

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20. Coming to the rate of interest to be taken for such refunds, we find that the Principal Bench of the CESTAT Delhi in the case of **Parle Agro Pvt Ltd Vs CCGST, Noida – 2022(380) ELT 219 (Tri-All)**, has held as under :

29. Section 11BB provides for interest on delayed refund. It states that if any duty ordered to be refunded under sub-section (2) of Section 11B is not refunded within three months from the date of receipt of the application, then the applicant shall be entitled to interest after the expiry of three months from the date of receipt of the application at such rate not below 5% and not exceeding 30% as may be notified by the Central Government in the Official Gazette.

30. In the present case, the provisions of Section 11B of the Excise Act would not be applicable. This is for the reason that the appellant was not claiming refund of duty. The applicant, as noticed above, had claimed refund of the revenue deposit. Such a finding has also been clearly recorded by the Tribunal in the order dated 31-1-2017, which order has attained finality.

39. In this connection reference can also made to the decisions of the Allahabad High Court in *Pace Marketing Specialities* and *Ebiz.Com Private Limited*, wherein after making reference to the decision of the Supreme Court in *Sandvik Asia Ltd.*, the High Court granted interest at the rate of 12% per annum in matters relating to refund of amount deposited during investigation and adjudication.

40. In *Riba Textiles*, the Tribunal also granted interest at the rate of 12% on refund of amount deposited during investigation and at the time of entertaining the stay application.

41. In view for the aforesaid decisions, and the fact that the rate of interest varies from 6% to 18% in the aforesaid Notifications issued under Sections 11AA, 11BB, 11DD and 11AB of the Excise Act, the grant of interest @ 12% per annum seems to be appropriate.

42. Thus, for the reason stated above, *Excise Appeal No. 70628 of 2019* is allowed and the order dated 28-5-2019, passed by the Commissioner (Appeals) is modified to the extent that interest shall be

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granted to the appellant @ 12% instead of @ 6% from the date of deposit till the date of payment.

21. Applying the ratio of this case law, we hold that the appellant would be eligible for interest from 3 months from the date of initial filing of refund claim till the date the amount is paid along with interest @ 12%. The refund along with the interest is to be granted within 8 weeks from the date of communication of this order.

22. To summarize:

(a) We hold that the appellants are eligible for refund of Rs. 8,05,266/-.

(b) We hold that the appellant would be eligible for interest from 3 months from the date of refund claim till the refund is paid.

(c) The interest payable would be @12% per annum.

(d) The refund and interest to be paid within 8 weeks from the date of communication of the order.

23. The impugned Order is set aside and appeal stands allowed as per above terms along with consequential relief.

(Pronounced in the open court on 07/01/2025.)

Sd/-

(R. Muralidhar)
Member (Judicial)

Sd/-

(K. Anpazhakan)
Member (Technical)

Pooja