CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO. ….

Service Tax Appeal No. 87534/2018

(Arising out of Order-in-Appeal No. NGP/EXCUS/000/APPL/383/17-18 dated 22/03/2018 passed by the Commissioner of Centeral Excise (Appeals), Central Excise & GST, Nashik.

……..Appellant

M/S. KAMAL CONSTRUCTION,
13, Kamalganga Apartments,
Opp. Indoline Furnitures,
MIDC, Ambad,
NASHIK-422 010.

VERSUS

COMMISSIONER OF CENTRAL EXCISE & GST, ……..Respondent
Nashik Commissionerate,
Plot No. 155, Sector P-34,
NH, Jaishta and Vaishaka,
CIDCO, NASHIK-422 008

APPERANCE:

Shri Sachin Chitnis, Advocate for the Appellant
Shri O.M. Shivadikar, AC, AR for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85728 / 2019

Date of Hearing: 13-12-2018
Date of Decision: 12-04-2019

SUVENDU KUMAR PATI:

1. The Appeal against rejection of refund claim of Rs. 7,00,000/- on the ground of unjust enrichment by the Commissioner (Appeals) vide his order dated 22-03-2018 in order No. NGP/EXCUS/000/

APPL/383/17-18 dated 22-03-2018, which was heard on 13-12-2018, is taken of order today.

2. On perusal of the case record, it is observed that vide order in Original passed on 18-10-2016, Appellant was refunded Rs. 7,00,000/- erroneously paid as Service Tax on commercial and industrial construction for construction of Cold Storage to store agricultural products which was exempted from payment of Service Tax vide notification 25/2012-ST dated 20-6-2012. The said amount was refunded to the Appellant Vide OIO No. SN-11/ST/NSK-22/R/2016-17, Asst. Commissioner, Service Tax Cell, NSK-II holding non-application of Section 11-b to Appellant's case. No appeal was filed against such adjudication order but Appellant was sought to show cause by the successive Asst. Commissioner on 7-2-2017 for recovery of the said refunded amount after which on 12-01-2018 notice of appeal has been sent by Superintend Office, Central Tax, Nasik informing filing of appeal against OIO which was allowed by the Commissioner (Appeals) on the ground that at some point of time, the same amount was not refunded to the service receiver, which established unjust enrichment though at the time of filing refund claim, such amount was duly transferred to the service receiver M/s. Fresh Agro Exports, Nasik. The Appellant claims that it had sought time on 8-3-2017 to reply to the show cause notice and replied to it on 27-3-2017 after which no communication was received from the Respondent department by the Appellant. The said show cause-cum-demand notice, which can never be issued against quasi-judicial order even if erroneous, did not reveal filing of any appeal against the order in original. Therefore, it is evident from the record that between 7-2-2017 and 12—1-2018, Appeal was filed which should never had been admitted by the Commissioner (Appeals) who lacks jurisdiction to entertain such an appeal after the normal period of appeal and condonable period of one month available at his end. The annexed documents to the notice of appeal dated 12-1-2018 i.e. appeal memo does not contain any date of filing of such appeal, though received date is shown as 17-1-2017 in the order of Commissioner (Appeals). It seems that to bring the appeal into purview of the limitation period, such a futile exercise by way of issuing of show cause against adjudication order which is quasi-

judicial and only appellable is done by the respondent which is a fraud on the Court.

3. Since the Commissioner (Appeals)'s order is unsustainable in law despite his endorsement in order that appeal was filed on 30-1-2017, the same is admittedly a misstatement made by another quasi-judicial appellate authority as in the appeal memo endorsement of the Commissioner bears 17-1-2017 as date of filing and it was sent to the appellant on 12-1-2018 i.e., almost after one year. Furthermore show cause notice to the Appellant issued on 7-2-2017 making duty demand holding adjudication order of refund as erroneous which is silent about such filing of appeal in an hypothecated date mentioned by the Commissioner (Appeals) cannot be taken as the date of filing of appeal before him. I have, therefore, got no hesitation that Commissioner (Appeal)'s order, which is assailed in this appeal, is passed without authority of law and hence the order.

4. The appeal is allowed and order passed by Commissioner, Nashik order No. NGP/EXCUS/000/APPL/383/17-18 dated 22-3-2018 is hereby set aside.

(Pronounced in open Court 12-04-2019)

Dr. Suvendu Kumar Pati
MEMBER (JUDICIAL

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