CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. 87705 of 2018.

(Arising out of Order-in-Appeal No. NS/EXCUS/000/APPL/212/17-18 dated 20-02-2018 passed by the Commissioner (Appeals), GST & CE, Nashik-422008.

D S CHAVAN ENGINEERING WORKS ....Appellant
QRT NO. 46/6 NTPC COLONY EKLAHARA
NASHIK ROAD
NASHIK – 422 002

VERSUS

Commissioner of C.E. & ST. - ....Respondent
NASIK (APPEAL)
Kendra Rajaswa Bhawan,
Old agra Road, Gadkari Chowk,
Nasik – 422 002.

APPERANCE:

Ms. Tejal Patil, Advocate for the Appellant

Shri Onil Shivadikar, Asst. Commissioner, Authorised Representatives for the Respondent

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

FINAL ORDER NO. A/86093/2019

Date of Hearing: 14-02-2019
Date of Decision: 13-06-2019

PER: DR. SUVENDU KUMAR PATI

Rejection of refund claim on Service Tax of ₹ 3,11,119/- paid towards Manpower Supply Services during the period from 2003 to

2008 is the subject matter of this Appeal in this second round of litigation.

2. Facts of this case, in brief, is that investigation made by the Department noticed non-payment of Service Tax of ₹ 3,48,352/- and ₹ 38,617/- under the taxable category of "Manpower Supply Services" and "Cleaning Agency Services" respectively, besides payment of ₹ 3,50,274/- and ₹ 45,053/- towards Service Tax of those two services respectively during the investigation. Appellant was put to show cause, matter was adjudicated, duty demand, interest and equivalent amount of penalty were confirmed. Appellant got part relief in the appeal preferred before the Commissioner (Appeals) which was again challenged in the CESTAT which by its order dated 4-8-2015 and subsequent rectification dated 29-2-2016 gave its finding that the views undertaken by both lower Authorities as to the activity undertaken by the Appellant would fall under the category of 'manpower, recruitment and supply agency' needs to be set aside. Appellant accordingly filed refund claim but the same was again rejected by the adjudicating authority and Commissioner (Appeals) for which it preferred appeal before this Tribunal.

3. Matter was heard at length from both the sides on the other day. On perusal on case record, it is noticed that the grounds of rejection of refund were primarily three: First; Commissioner (Appeals) had held that ₹ 3,11,119/- paid by the Appellant without protest in the year 2007 – 2008 was in dispute as service tax amount for which,

under section 11B of Central Excise Act 1944 limitation period for refund was to be treated as one year from the date of payment and refund claim made on 10-6-2016, by bringing section 11B sub-section 5 explanation B(EC) providing one year period for allowing refund claim from the date of order of the Appellate Tribunal, was not acceptable; Second, payment of service tax was established through filing of TRC Challan for which Appellant cannot claim the same amount as deposit and not service tax payment; third, without expressing his opinion on unjust enrichment, which was held against the Appellant in the Order-in-Original, section 11B(1) has been entirely reproduced in his order to substantiate that Appellant had not furnished documents or other evidence concerning non passing of the incidence of duty to any other person.

4. Learned Counsel for the Appellant Ms. Tejal Patil explained, in detail in her written note of submission, regarding calculation of refund claim of ₹ 3,11,119/- and furnished certificate of Chartered Accountant as well as Balance Sheet of the relevant year 2007-2008 justifying non- applicability of doctrine of unjust enrichment to the applicant while Learned Authorised Representative Shri Onil Shivadikar, Asst. Commissioner, in placing judicial decision pronounced in the case of *HT MEDIA LTD. v. Commissioner of Service Tax, Delhi, (2017-TIOL-370-CESTAT-DEL), and M/s. Star Enterprises v. Commissioner of Central Excise and Service Tax, Allahabad (2019-TIOL-232-CESTAT-ALL),* argued that all excess amount paid by way of service tax can only be refunded subject to provision of section 11B only and appellant

had failed to comply the same. To counter such submission it would be imperative to have a look at relevant para 9 of the judgement passed by CESTAT Mumbai in the case of CCE v. Clariant (I) Ltd. – 2015 (319) ELT 646 (Bom)

> ***"9.*** *With the assistance of the learned counsel appearing for parties, we have perused the appeal paper book as also the original record transmitted by the Registry of the Tribunal. It is true that the payment of duty was made by the assessee and that was in terms of the computation made by it. It was debited in the revenue account in November and December of 1997. It is true that this payment was not made under protest. Payment was made voluntarily but the revenue did not accept it as a clearance of duty liability and in accordance with law. The revenue therefore proceeded to raise a demand and issued four show cause notices. A reading of the show cause notices would reveal as to how the revenue proceeded to demand the sums set out therein and purported to adjust the payment already made by the assessee. Thus, the liability of the assessee was not crystallized according to the Revenue until this show cause cum demand notice was adjudicated. If that was admittedly issued and the show cause cum demand notice was required to be adjudicated in accordance with law, the adjudication order dated 22nd December, 2000 was taken to be the relevant date. In the given facts and circumstances and peculiar to the assessee the date was not reckoned from payment but from the date of receipt of a copy of the adjudication order. The demand was admittedly dropped by this adjudication order. Once that adjudication order furnished the cause for seeking refund, then the refund application, a copy of which is at page 55 of the paper book and lodged on 20th Feb, 2001 was well within time. It is not the argument of Mr. Rao that only if the refund of duty made under protest a refund of duty can be sought. Even if it voluntarily paid refund can be sought provided, the application is made in terms of the second Proviso to Section 11B(1) of the Act. If the computation of the tax by assessee in this case had been accepted and in 1997 itself, there was no question of claiming refund. Since the revenue did not accept this payment as clearance of the liability to pay duty in accordance with law it issued show cause cum demand notice. That notice demanded the sums over and above the payment made by the assessee in November and December, 1997. That demand was required to be adjudicated and was indeed adjudicated by the competent authority under the Central Excise Act, 1944, the order passed by him resulted in dropping of the proceedings and*

the demand. Therefore, once the show cause notice was dropped the assessee in this case became entitled to seek refund. That such an application was maintainable and could have been granted, provided it was lodged within the period of limitation and as prevalent in terms of the applicable legal provision. At the relevant time, the period of limitation was six months. The period of six months was not reckoned in this case from the payment but from the date of adjudication order. If that is how the Tribunal proceeded and interfered with the order of the Commissioner (Appeals) which was assailed before it by the assessee, then, we do not see how the reversal of the order of the Commissioner by the Tribunal results in any substantial question of law. Given the admitted facts and peculiar to the assessee, the legal provision as it read at the relevant time, the claim for refund was maintainable and was rightly granted by the order dated 8th June, 2001. It is that order which has been upheld by the Tribunal. In such circumstances, we do not see any basis for the complaint by the Revenue. <u>*Mr. Rao's submissions overlook the fact that the claim for refund can also be made if the duty is paid voluntary and not under protest or without prejudice.*</u> *The only requirement is that the refund must be sought within the specified period and the limitation is provided by the second proviso to Section 11B. If the application was filed within this period it could have been considered and the refund sanctioned and granted. Precisely that has been done in the instant case."*

(Underlined to emphasize)

5. Admittedly, as apparent from record, no document was produced before the adjudicating authority and Commissioner (appeals) to justify non-applicability of doctrine of unjust enrichment to the appellant but submission of CA Certificate and Balance Sheet of company during hearing of the appeal, which is not objected by the Respondent Department, the same can be taken as additional evidence as per rule 23 to CESTATE procedure Rules 1982. Cursory reading of the documentary evidence would reveal that incidence of tax has not been passed on by the Appellant to any other person. This being so, in carrying forward the judicial precedent set by this Tribunal in the decision cite above in CCE v. Clariant (I) Ltd., that such refund

is admissible as a consequence of judgement/order of Appellate Tribunal even if the payment was made voluntarily and without any protest, the following order is passed.

ORDER

6. The appeal is allowed and the order passed by the Commissioner (Appeals), GST & CE, Nashik-422008 in Appeal No. NS/EXCUS/000/ APPL/212/17-18 dated 20-02-2018 is hereby set aside. The appellant is entitled to get refund of ₹ 3,11,119/- with applicable interest and the Respondent Department is directed to pay the same within three (3) months of communication of this order.

(Order pronounced in the Court on 13-06-2019)

(DR. SUVENDU KUMAR PATI)
MEMBER (JUDICIAL)

John