CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

REGIONAL BENCH - COURT NO. 02

Service Tax Appeal No. 89869 of 2014

(Arising out of Order-in-Appeal No. PUN-EXCUS-003-APP-046-14-15 dated 22.07.2014 passed by Commissioner of Central Excise (Appeals), Pune-III)

M/s Swapnali Bhosale Constructions .....**Appellant**
ABIL House, 2, Ganesh Khind Road,
Range Hill Corner, Pune-411007

VERSUS

Commissioner of Central Excise
Pune III .....**Respondent**
41/A, David Sasson Road, Pune-411001

Appearance:

Shri M.P. Joshi, Advocate for the Appellant
Shri Dilip Shinde, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/88532 / 2018

Date of Hearing: 13.11.2018
Date of Decision: 13.11.2018

Per: S.K. MOHANTY

1. This appeal is directed against impugned order dated 22/07/2014 passed by the Commissioner of Central Excise (Appeals), Pune.

2. Rejection of refund claim in respect of service tax paid on maintenance or repair service and construction of residential complex service is the subject matter of present dispute. In this case,

the appellant had filed the refund application, claiming refund of service tax paid on the above mentioned taxable services provided by it. The said application was filed online in the ACES (Automation of Central Excise and Service Tax) computer system of the service tax department on 19/08/2012. Subsequently, the appellant had submitted a letter dated 01/11/2012 to the service tax department, enclosing therewith the self certified copy of the refund application. By letter dated 02/11/2012, the refund application was returned to the appellant for submission of certain documents, which were essential for deciding the refund claim. The refund application along with the relevant documents was submitted by the appellant on 19/12/2012. While adjudicating the matter, the original authority had considered the date of filing of refund application as 19/12/2012 and accordingly, rejected the refund application on the ground of limitation provided under Section 11B of the Central Excise Act, 1944 made applicable to the service tax matters in terms of Section 83 of the Finance Act, 1994. The refund application was also rejected on merits, holding that during the disputed period, the appellant had provided maintenance and repair service to the perspective flat owners and that there was no excess payment of service tax on the MSEB charges. On appeal, the learned Commissioner (Appeals) vide impugned order dated 22/07/2014 has upheld the adjudication order.

3. Heard both sides and perused the records.

4. It is observed from the findings recorded in the impugned order that the refund application was initially filed by the appellant online on 19/08/2012, which was returned by the department and subsequently, re-submitted along with requisite documents on 19/12/2012 by the appellant. It is evident that the refund application filed online in the ACES computer system was accepted and receipt of the same was acknowledged by the department on 19/08/2012. For the purpose of computation of limitation period for entertaining the refund application, Section 11B *ibid* provides that the application should be filed within one year from the relevant date. In this case, refund application filed online was not rejected by the department and the same was returned to the appellant for re-submission after enclosing the relevant data/particulars. As per the statutory provisions, the date of re-submission of refund application should not be considered as the relevant date for computation of the limitation period. In this context, Hon'ble Delhi High Court in the case of CCE Vs. Arya Exports & Industries -2005 (192) ELT 89 (Del) have held that if refund claim has not been filed in the proper form or without necessary documents, department can direct the appellant to file the same in the proper form along with supporting

documents. It has further been held that date of filing claim is date of which claim was filed initially in the form not prescribed or without documents. Further, this Tribunal in the case of the Design Consortium Vs. CCE, Delhi-II-2015 (40) STR 734 (Tri-Del) has also considered that date of filing refund application electronically should be considered as relevant date and not the date when the refund application was re-submitted by the appellant. The Tribunal also in the case of Angiplast Pvt.Ltd. Vs. CCE, Ahemadabad – 2010 (19) STGR 838 (Tri - Ahmed) has held that initial date of filing refund claim relevant and subsequent date of filing in proper form and with documents not to be considered as actual date of filing. In view of settled position of law, we are of the considered opinion that rejection of refund application on the ground of limitation is not proper and justified.

5. With regard to refund of service tax paid on maintenance and repair service, we find that the learned Commissioner (Appeals) has recorded the submissions of the appellant that it had neither provided any service of maintenance nor the said deposit is towards consideration of construction service. Further, the appellant had also submitted the books of accounts to show that the deposit amount received from the flat owners were reflected in the liability side of the balance sheet. However, submissions made by the appellant

were ignored by the learned Commissioner (Appeals) and has upheld the adjudication order by solely pleasing relevance on paragraph 8 of the agreement to sell. On going through such agreement, we do not find any evidence that the appellant had provided any service for repair and maintenance of the flats belonging to the flat owners. Thus, in the absence of any provision of service, mere acceptance of deposit by the appellant will not subjected to levy of service tax under the taxable category of repair or maintenance service. Thus, the service tax simultaneously paid by the appellant should be eligible for refund.

6. As regards the claim for refund on the ground of double payment of service tax by the appellant on MSEB deposit, we find that the appellant had not produced any documentary evidence either before the original authority or before the Commissioner (appeals), and accordingly, the refund claims were denied. Since the onus entirely lies with the appellant to produce evidence regarding twice payment of service tax on MSEB deposit, which are not being satisfactorily explained by the appellant, we are of the view that rejection of refund benefit on such ground is sustainable. However, considering the submissions of the appellant that it can produce evidences regarding payment of service tax twice on MSEB deposit, we are of the view that the matter should be remanded to the

original authority for verification of such documents and for proper fact finding whether the amount has been paid twice by the appellant.

7. To sum up, the appeal is disposed off in following terms:

i) Refund application is sustainable on the ground of limitation.

ii) In the absence of provision of any service, the deposit amount collected on account of maintenance charges should not be subjected to levy of service tax under repair or maintenance service and accordingly, the appellant should be eligible for refund.

iii) Matter is remanded to the original authority for verification of documents to ascertain whether service tax has been paid twice by the appellant on MSEB deposit.

(Order dictated in Court)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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