CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. 88294 of 2019

(Arising out of Order-in-Appeal No. NA/CGST/A-I/MUM/144/19-20 dated 29.08.2019 passed by the Commissioner of GST & CX (Appeals-I), Mumbai.)

M/s Raheja Regency Co-operative Housing Society Limited ....Appellant
106, Industrial Area, Road No. 29,
Near Telephone Exchange,
Sion East, Mumbai – 400 022

VERSUS

The Commissioner of GST & Central Excise, Mumbai ....Respondent
9th Floor, Lotus, Parel, Lotus
Info Centre, Near Parel Station,
Parel East, Mumbai – 400 012

APPERANCE:

Shri Mahesh Raichandani, Advocate for the Appellant
Shri Dharmendra Singh, Superintendent, Authorised Representative for the Respondent

CORAM:

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

FINAL ORDER NO. A/85943/2020

Date of Hearing: 03.11.2020
Date of Decision: 16.12.2020

Rejection of refund claim on Service Tax paid under protest on contribution received from members of a co-operative housing society is assailed in this appeal.

2. Factual back-drop of the case, in a nutshell, is that appellant filed refund claim on 03.08.2017 amounting to Rs.8,06,393/- towards Service Tax paid under protest during the period April, 2016 to March, 2017 towards contributions collected from members of Housing society. The said claim was rejected by the Deputy Commissioner (Refund), CGST & C. EX, Mumbai East vide his order dated 14.03.2018 against which appellant preferred appeal before the Commissioner of GST & CX (Appeals-I), Mumbai who also rejected the same vide his detailed order dated 29.08.2019 that resulted in filing this appeal before the CESTAT.

3. In the memo of appeal and during the course of hearing of the appeal, learned Counsel for the appellant Mr. Mahesh Raichandani, with reference to Hon'ble Supreme Court judgment reported in *2019-TIOL-449-SC-ST-LB in the case of State of West Bengal Vs. Calcutta Club Ltd.* and final order passed by this Tribunal in order no. *A/86200/2019 dated 04.07.2019* in appellant's own case as well as judgment passed in *Tahnee Heights Co-operative Housing Society Ltd. Vs. Commissioner of CGST, Mumbai South* reported in *2019 (21) GSTL 440 (Tri.- Mumbai)* had argued that *doctrine of agency, trust and mutuality* clearly demonstrate that the activity carried out by the housing society was for and on behalf of the members who's contribution can never be considered as a service by one person to another for a consideration and therefore no Service Tax is leviable on the same for which the order passed by the Commissioner (Appeals) is required to be set aside.

4. In response to such submissions, learned Authorised Representative for the respondent-department Mr. Dharmendra Singh, Superintendent argued in favour of the reasoning and rationality of the order passed by the Commissioner (Appeals) and took this Bench through the provisions contained in mega examination Notification No. 25/2012-ST dated 20.06.2012 that contained specific exemption relating to housing societies at Sr. No. 28 (c) that would disentitle the appellant from getting refund of the Service Tax paid, for which he sought for no interference by the Tribunal in the order passed by the Commissioner (Appeals).

5. Perused the case record, the case laws submitted by the appellant and the relevant notification referred above along with Circular No. 175/01/2014-ST that provided clarification about levy of Service Tax on services provided by a Residential Welfare Association *vis-a-vis* Order-in-Original and Order-in-Appeal. The order passed by the adjudicating authority is cryptic and has no regard for the judicial precedent set by the Tribunal. Rejection of refund claim by him on the ground that appeal is pending in the Hon'ble Supreme Court against the cited judgment gives an impression that orders of the Tribunal are to be disregarded after filing of the appeal . It appears that he was empowered to violate the principles set by the Tribunal, once the same had been challenged in an appellate forum despite the settled principle of law that such an order has to be respected unless and until the same is set aside [*Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman & Ors. (1871) 1 SCR 66*] However,

learned Commissioner (Appeals) had gone on a different ground basing on the Circular No. 175/01/2014-ST and Notification No. 25/2012-ST [Sr. No. 28 (c)] that has clearly demonstrated that such Residential Welfare Association (RWA) must be a non-profit entity and collecting a contribution within monetary celling of Rs.5000/- prescribed in the said notification though without expressing in clear language that in fulfilling such conditions only, *doctrine of mutuality* would be respected. As found from the case record, appellant was not even issued with a show-cause notice before rejection of such refund claim, for which appellant also raised the issue of violation of principles of natural justice as a ground for setting aside the Order-in-Original before Commissioner (Appeals). Compliance of such a requirement would have enabled the appellant to establish per head contribution of members to RWA and if such constitution is non-profit in nature. The cited case laws have no reference to such notification and clarificatory circular also that would have given a finality to the issues under dispute. Under these circumstances, I consider it as a fit case that requires to be re-adjudicated by the Commissioner (Appeals) who is equally empowered under Section 35A(3) of the Central Excise Act, 1944, applicable to Service Tax matters too, to make an inquiry himself and arrive at a finding. Hence the order.

ORDER

6. The appeal is allowed by way of remand to the Commissioner (Appeals) and the order passed by the Commissioner of GST & CX

(Appeals-I), Mumbai *vide* Order-in-Appeal No. NA/CGST/A-I/MUM/144/19-20 dated 29.08.2019 is hereby set aside.

(Order pronounced in the open court on 16.12.2020)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad