

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 52346 of 2018

(Arising out of Order-in-Appeal No. BHO-EXCUS-002-APP-525-2017-18 dated 22.03.2018 passed by the Commissioner (Appeals), Central Excise & Central Goods & Services Tax, Raipur)

Deepak Pandey

Shop No. 1 FE Pt. LLM Complex
Kankali Para,
Raipur (Chhatisgarh)

...Appellant

VERSUS

Commissioner of Service Tax,

Service Tax Division, Civil Lines
Raipur (Chhattisgarh)

...Respondent

APPEARANCE:

Ms. Nikita Jaju, Advocate for the Appellant

Ms. Jaya Kumari, Authorized Representative of the Department

CORAM :

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing/Decision: January 10, 2025

FINAL ORDER NO. 50065/2025

JUSTICE DILIP GUPTA

The order dated 22.03.2018 passed by the Commissioner (Appeals) that dismisses the appeal filed by the present appellant against the order dated 09.05.2017 passed by the Assistant Commissioner rejecting the refund claim of the appellant, has been assailed in this appeal.

2. It transpires from the records of the appeal that the appellant filed an application on 09.02.2017 claiming refund of service tax paid on Government work during the period from April 2015 to December 2015 on the basis of section 102 of the Finance Act, 1994¹ which

1 the Finance Act

came into effect on 14.05.2016. This application has been rejected for the reason that it had been filed beyond the period of six months prescribed under section 102 of the Finance Act.

3. The Commissioner (Appeals) has, in the order impugned, observed that since section 102 of the Finance Act is a self contained provision for refund of any tax paid and it provides time limit of six months for filing the refund application, the Assistant Commissioner correctly rejected the refund claim as being barred by time.

4. Ms. Nikita Jaju, learned counsel appearing for the appellant has submitted that no doubt that section 102 of the Finance Act permitted the appellant to claim the refund, but such refund can be claimed by the appellant within a reasonable period of time and to support this contention, learned counsel placed reliance upon a decision of a learned Member of this Tribunal in **M/s Aadhar Stumbh Township Pvt. Ltd.**² Learned counsel also placed reliance upon the decision of the Karnataka High Court in **Commissioner of Central Excise (Appeals), Bangalore** versus **KVR Construction**³.

5. Ms. Jaya Kumari, learned authorised representative appearing for the department, however, supported the impugned order and submitted that it is not open to the appellant to claim refund under sub-section (1) of the section 102 of the Finance Act and also at the same time claim that sub-section (3) of the section 102 would have no bearing on the refund claim. Learned authorised representative placed reliance on a decision of the Madhya Pradesh High Court in **MDP Infra (India) Pvt Ltd.** versus **Commissioner of Customs, Central**

2. Service Tax Appeal No. 50046 of 2020 decided on 08.06.2022

3. 2012 (26) S.T.R. 195 (Kar.)

Excise & CGST⁴, against which decision the Civil Appeal filed by the assessee was dismissed by the Supreme Court holding that there is no infirmity in the view taken by the Tribunal as well as the High Court.

6. The submissions advanced by the learned counsel for the appellant and the learned authorised representative appearing for the department have been considered.

7. To appreciate the contentions, it would be appropriate to reproduce section 102 of the Finance Act and it is as follows:

"102.Special provision for exemption in certain cases relating to construction of Government buildings -

(1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of-

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry or any other business or profession;

(b) a structure meant predominantly for use as -

- (i) an educational establishment;
- (ii) a clinical establishment; or
- (iii) an art or cultural establishment;

(c) a residential complex predominantly meant for self-use or for the use of their employees or other persons specified in Explanation 1 to clause (44) of section 65B of the said Act,

under a contract entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date.

(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times.

(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of the President."

8. A bare perusal of sub-section (1) of section 102 of the Finance Act shows that notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 01.04.2015 to 29.02.2016, in respect of taxable services provided to the Government, a local authority or a Governmental authority in respect of certain matters enumerated therein under a contract entered into before 01.03.2015. Sub-section (2) of the section 102 provides that refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times. Sub-section (3), however, provides that notwithstanding anything contained in Chapter 5 of the Finance Act, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Act, 2016 receives the assent of the President, which date is 14.05.2016.

9. The sole reason for rejecting the refund application is that the appellant did not file the application within the time stipulated in sub-section (3) of the section 102 of the Finance Act.

10. Learned counsel for the appellant does not dispute that the application was filed beyond six months but what the learned counsel contends is that irrespective of the time limit prescribed in sub-section

(3) of the section 102, it would be open to the appellant to move the refund application within a reasonable period of time.

11. It is not possible to accept this contention of the learned counsel for the appellant. The appellant cannot be permitted to claim refund of service tax under sub-section (1) of section 102 and at the same time contend that the condition stipulated in sub-section (3) of section 102 of the Finance Act should be ignored. When sub-section (3) specifically provides that notwithstanding anything contained in Chapter 5, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Act, 2016 receives the assent of the President, it clearly implies that the application has to be moved within six months and not after the expiry of period of six months. The submission advanced by learned counsel is clearly contrary to provisions of sub-section (3) of section 102 of the Finance Act.

12. The aforesaid view that has been taken finds support from the decision of the Madhya Pradesh High Court in **MDP Infra (India)**. While examining a similar plea regarding the time limit provided under sub-section (3) of the section 102 of the Finance Act, the Madhya Pradesh High Court observed as follows:

“**10.** That by order dated 15-6-2017 the refund claim was dismissed being time barred under Section 11B of 1944 Act.

11. Aggrieved, appellant preferred an appeal on the ground that the substantial benefit should not be denied as the appellant has made the payment of service tax on the contracts which were exempted during relevant period. As there was no legal authority to sustain the amount paid by the appellant, the department has no authority to withhold the same on the ground of limitation. It was stated that the provisions of Section 11B of 1944 Act would get attracted when there is a liability and excess duty/tax is deposited and later on the refund of such excess amount is sought. It

was stated that being exempted, the appellant was not liable to pay the service tax. Therefore, the amount received by the department was not towards the tax as would be governed by the provisions of Section 11B. It was urged that even if it is then the period of limitation prescribed being one year and since notification for restoration of exemption was issued on 1-3-2016 and the appellant had filed the refund claim on 24-3-2017, the same should have been allowed.

12. The appeal was, however, dismissed on 28-9-2017 by Commissioner (Appeals), on the findings :-

“7. To put the legal position in proper perspective, I may mention that initially the mega exemption notification No. 25/2012-S.T. granted exemption *inter alia* to certain activities undertaken for the government. The said notification was amended vide notification No. 6/2015-S.T., dated 1-3-2015 whereby the said exemption for the Govt. work was withdrawn. Later, vide notification No. 9/2016-S.T., dated 1-3-2016 the said exemption was restored. The notification No. 9/2016-S.T. is prospective in nature and it does not grant retrospective exemption to the activities undertaken prior to 1-3-2016 as wrongly contended by the appellant. The retrospective exemption was granted by the legislature by way of section 102 which was inserted vide the Finance Act, 2016. The said section 102 of the Act read as under.

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8. It can be seen that section 102 was a self-contained provision for refund of any tax paid during the impugned period. The said section also provided the time limit of 06 months for filing the refund claim from the date of enactment of the Finance Act, 2016. The said section came into effect on 14-5-2016. The claim having been filed on 24-3-2017 is clearly beyond the time limit of six month prescribed in the section 102. Therefore, the adjudicating authority has rightly rejected the refund claim.

9. I may also to mention that the claim filed by the appellant is also beyond one year from the date of issue of notification No. 9/2006-S.T., dated 1-3-2006 and to some how claim the refund from the department they have arbitrarily calculated the time limitation of one year from the month of issuance of the said notification. They have also deliberately avoided any mention of section 102 inserted vide Finance Act, 2016 which would have exposed and undetermined their refund claim as the same was clearly time barred.”

13. On further appeal, the Tribunal vide impugned order affirmed the order rejecting refund claim. The Tribunal taking into consideration the stipulations contained under Section 102 of the Finance Bill, 2016 prescribed specific period of limitation of six months from the date of the assent of the President (which being 14-5-2016) for refund. And that the appellant applied for refund on 24-3-2017, i.e., with a delay of 131 days, dismissed the appeal observing :-

"8. Having carefully heard the submissions of both the sides, I find that there is no dispute on the facts. The retrospective exemption having been granted by the legislative, there was a clause for refund of the tax paid during the intervening period subject to the condition that such refund claim are filed within the period of six months. Admittedly, the refund stands filed beyond the said period, thus, contravening the condition. There is no power with the Central Excise Authorities to legislate or to travel beyond the statutory limitations provided by the legislature. Similarly, neither the Tribunal has such powers to go beyond the provisions of the Act. The issue is well settled. Reference can be made to Hon'ble Supreme Court decision in the case of *Porcelain Electrical Mfg. Co. v. CCE, New Delhi - 1998 (98) E.L.T. 583 (S.C.)*, wherein it was observed that the refund claim filed before departmental authorities are to be governed by the time limit provided under the statute and the general law of limitation invoked by various High Courts under their extraordinary jurisdiction is inapplicable to the cases where the refund obligations has been moved before the Revenue authorities."

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16. As regard to substantial question of law at 'B', the said question in given facts of present also does not arise for consideration. The appellant was under legal obligation to deposit the service tax in respect of the service rendered qua non-exempted service. The contentions that it was beyond the control of the appellant to deposit the service tax on exempted service is misconceived. Evidently, the Notification No. 12/2012 & 25/2012 ceased to exist w.e.f. 1-4-2015. The exemption was revived by notification dated 1-3-2016. But since it was prospective in effect, the appellant was not entitled for any exemption, which the appellant was aware of and with open mind and eyes deposited the service tax due with interest. **It was only by virtue of subsequent legislation the notification was made effective from retrospective date with the stipulations that refund can be claimed within specific time provided. There was thus no ambiguity nor any dispute as would have prevented the appellant from seeking refund within the period of limitation.** On these given facts the substantial question at 'B' also does not arise for consideration."

13. The appellant therein filed an appeal before Supreme Court, being Civil Appeal No. 6335 of 2019, which appeal was dismissed by the Supreme Court on 17.02.2021 holding:

"1. We have heard learned counsel for the parties.

2. We find no infirmity in the view taken by the first authority, which has been rightly affirmed by the Customs, Excise And Service Tax Appellate Tribunal, as well as the High Court. There is no merit in this appeal. The civil appeal is dismissed accordingly."

14. The Supreme Court dismissed the appeal holding that the Tribunal and the High Court had correctly affirmed the view taken by the first authority rejecting the application for the reason it was filed after six months.

15. Learned counsel for the appellant has, however, placed reliance upon a decision of a learned Member of the Tribunal in **Aadhar Stumbh Township**. The relevant portion of the decision is reproduced below:

"19. Having considered the rival contentions, I find that there is sufficient evidence on record that appellant had dispatched the refund applications by speed post on 8.11.2016, which were returned by the Department by refusing to accept. Further, refusing of refund by the Department is evident from the facts on record, as the Service Tax Division has been shifted from CGO Complex, New Delhi to Ambedkar Bhawan, Rohini, New Delhi. Thus, I hold that the appellant had dispatched the refund application well within the period of limitation, which was expiring on 14.11.2016. Such dispatch on 8.11.2016 is also proved by the fact that the appellant has soon thereafter receipt back of the mail with the remark "refused to accept", has again filed the application by hand on 5.12.2011. In this view of the matter, I hold that the refund application has been filed within the limitation as prescribed under Section 102(3) of the Finance Act. I further hold that in view of Section 102(1) and (2) of the Finance Act, the service tax deposited by the appellant has taken the changed character of revenue deposit, by operation of law as the Government of India extended exemption with retrospective effect vide notification no.9/2016-ST read with Section 102 introduced by Finance Act, 2016. Thus, the rejection of refund by Revenue is also hit by Article 265 of the Constitution of India. I further hold that no

limitation is applicable for refund in the facts and circumstances of the present case, due to the amount lying with the Revenue having the nature of revenue deposit.”

16. This decision of a learned Member is clearly against the terms of sub-section (3) section 102 of the Finance Act. As noted above, once the time limit of six months has been provided, it cannot be contended that merely because the character of the tax deposit would continue to be in the nature of the tax collected without authority of law and, therefore, no limitation can be prescribed for filing the refund application. The learned Member failed to take into consideration the terms of sub-section (3) of the section 102 while arriving at such a conclusion.

17. In fact, the Madhya Pradesh High Court in **MDP Infra (India)** also repelled the view taken by the learned Member.

18. We, therefore, have no hesitation in holding that the decision of the learned Member in **Aadhar Stumbh Township** does not lay down the correct position in law.

19. Learned counsel for the appellant also placed reliance of the judgment of the Karnataka High Court in **KVR Construction**. The provisions of the section 102 of the Finance Act were not under consideration in this judgment. All that was considered was if service tax has been paid under a mistake, then the time limit provided under section 11B of the Central Excise Act would not be applicable.

20. This decision of Karnataka High Court would, therefore, not be of any avail to the appellant. This decision of the Karnataka High Court has also been distinguished by the Madhya Pradesh High Court in **MDP Infra (India)**.

21. There is, therefore, no infirmity in the order passed by the Commissioner (Appeals) upholding the view taken by the Assistant Commissioner rejecting the refund claim as being barred by time.

22. The appeal would, therefore, have to be dismissed and is dismissed.

(Order dictated and pronounced in the open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Diksha