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

Appeal No. ST/86347/2018

(Arising out of Order-in-Appeal No. IM/CGST A-I/MUM/116/17-18 dated 28.12.2017 passed by Commissioner of Central Tax (Appeals), Mumbai)

Casa Grande Co-Operative Housing **Appellant**

Vs.

Commissioner of CGST, Mumbai South **Respondent**

Appearance:

Shri Vipin Jain, Advocate for appellant
Shri M.K. Sarangi, Jt. Commr (AR) for respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Date of Hearing: 01.08.2018
Date of Decision: 11.01.2019

FINAL ORDER NO. **A/85048 / 2019**

Per: S.K. Mohanty

This appeal is directed against the impugned order dated 28.12.2017 passed by the Commissioner of Central Tax (Appeals), Mumbai, upholding the adjudication order dated 11.11.2006, by which the Asst. Commissioner (Refund), Service Tax-II, Mumbai had rejected the claim for refund of service tax amounting to Rs.20,38,255/- filed by the appellant.

2. Brief facts of the case are that the appellant is engaged in providing taxable service under the category of "Club or

Association Service" defined under Section 65(25a) of the Finance Act, 1994. The appellant is registered with the service tax department for providing of such taxable service. During the disputed period 2005-06 to 2014-15, the appellant had deposited the service tax amount in respect of such taxable service on different dates (1st and last of days of such deposits being 22.10.2009 and 30.04.2014 respectively). The appellant had filed the refund application before the Jurisdictional Service Tax authorities on 19.09.2016 on the ground that the service provided by the club to its members cannot be considered as taxable service by one legal entity to another and hence, not liable to service tax, on the principles of mutuality. The refund application filed by the appellant was rejected by the original authority on the ground that the same was filed beyond the prescribed time limit provided under Section 11B of the Central Excise Act, 1944 made applicable to service tax matters under Section 83 of the Finance Act, 1994. On appeal, the learned Commissioner (Appeals) vide the impugned order dated 28.12.2017 has upheld rejection of the refund application by the original authority.

3. Learned Advocate appearing for the appellant submitted that for the first time the appellant became aware about the decision rendered by this Tribunal in the case of *Matunga Gymkhana vs. Commissioner of Service Tax, Mumbai – 2015 (38) STR 407 (Tri-Mum)*, holding that contribution received by

the housing society from its members is not exigible to service tax under the Head "Club or Association Service" and accordingly, upon seeking legal opinion, filed an application dated 19.08.2016, claiming refund of service tax paid during the period 2005-06 to 2014-15. He further submitted that since the levy of service tax under such category of service was held as unconstitutional by the Hon'ble Gujarat High Court in the case of *Sports Club of Gujarat Ltd.[2013 (31) STR 645 (Guj.)]* and by Hon'ble Jharkhand High Court in the case of *Ranchi Club Ltd.*[2012 (26) STR 401 (Jhar.)], the limitation prescribed under Section 11B of the Central Excise Act, 1944 does not apply and in such cases, the general rule of limitation prescribed under the Limitation Act, 1963 alone will be applicable. Thus, he submitted that the refund claim having been filed within the limitation period prescribed under the Limitation Act, 1963, the benefit cannot be denied on the ground of limitation. To support such stand, the learned Advocate has relied on the judgment of Hon'ble Supreme Court in the case of *Mafatlal Industries Ltd. v. Union of India – 1997 (89) ELT 247 (SC)* and the judgment of the Hon'ble Bombay High Court in the case of *Parijat Construction v. Commissioner of Central Excise, Nashik – 2018 (359) ELT 113 (Bom.)*.

4. On the other hand, the learned D.R. appearing for the Revenue reiterated the findings recorded in the impugned order

and further submitted that since the appellant had filed the refund application under Section 11B of the Act for claiming refund of "Service Tax", the time limit prescribed under the statute is strictly applicable for consideration of the refund application and the statutory authorities are not empowered to relax the limitation period, while entertaining the application filed under the statute. In support of such arguments, the learned D.R. has relied on the judgments' of the Hon'ble Supreme Court in the case of *Miles India Ltd. – 1987 (30) ELT 641 (SC), Collector v. Doaba Co-operative Sugar Mills – 1988 (37) ELT 478 (SC) and Assistant Collector of Customs v. Anam Electrical Manufacturing Co. – 1997 (90) ELT 260 (S.C.)*. The learned D.R has also relied on the judgment of the Hon'ble Supreme Court in the case of *Mafatlal Industries Ltd. (supra)* to state that where the tax levy is declared unconstitutional by the competent court, the claim for refund will not arise under such law, which was so affirmed as illegal. Therefore, he submitted that refund application filed by the appellant cannot be governed under Section 11B of the Act, and accordingly, rejection of the same by the lower authorities is proper and justified. Learned D.R. has also relied on the decision of the Larger Bench of this Tribunal in the case of *Veer Overseas Ltd. v. Commissioner of Central Excise, Panchkula – 2018-TIOL-1432-CESTAT-CHD-LB* to support the case of Revenue for rejection of refund application.

5. Heard both sides and perused the records, including the written submissions filed by both sides.

6. The facts are not under dispute that the appellant had filed refund applications on 19.08.2016, claiming refund of service tax paid by it on different occasions, ranging from 22.09.2009 to 30.04.2014; that the said applications were filed under Section 11B of the Central Excise Act, 1944 made applicable to the service tax matters vide Section 83 of the Finance Act, 1994; and that the refund sanctioning authority had adjudicated the refund applications under the said statutory provisions. Section 11B *ibid* deals with the situation of claim of refund of duty (service tax). Clause (f) in explanation (B), appended to Section 11B *ibid* provides the relevant date for the purpose of computation of limitation period for filing of refund application. As per the said statutory provisions, in the case of the present appellant, the date of payment of service tax should be considered as the relevant date. Section 11B ibid mandates that the refund application has to be filed before the expiry of one year from the relevant date. In this case, it is an admitted fact on record that the refund application was filed by the appellant beyond the statutory time limitation prescribed under the statute. Therefore, the refund sanctioning authority adjudicating the refund issue under the statute has no option or scope to take a contrary view, than the position prescribed in the statute, to decide the issue differently. In other words, when the

wordings of Section 11B are clear and unambiguous, different interpretations cannot be placed by the authorities functioning under the statute and they are bound to obey the dictates/provisions contained therein. In this context, the Hon'ble Supreme Court in the case of *Doaba Co-operative Sugar Mills (supra)* have held that if the proceedings have been initiated under the Central Excise Act by the department, the provisions of limitation prescribed in such Act alone will prevail with regard to applicability of the time limitation for filing the refund claim. Further, the Hon'ble Supreme Court in the case of *Anam Electrical Manufacturing (supra)* have also held that the period prescribed by the Central Excise Act / Customs Act for filing of refund application in the case of "illegal levy" cannot be extended by any authority or Court. With regard to the issue, whether the jurisdictional authorities can entertain the refund application filed beyond the statutory prescribed time limit, the Hon'ble Supreme Court in the case of *Miles India Ltd. (supra)* have endorsed the views expressed by the Tribunal that the Customs authorities acting under the Act were justified in disallowing the claim of refund, as they were bound by the period of limitation provided under Section 27(1) of the Customs Act, 1962 [*pari materia* with Section 11B (supra)].

6.1 In view of the above settled principles of law and in view of the fact that the refund applications were filed and decided under Section 11B *ibid*, the time limit prescribed there-under

was strictly applicable for deciding such issue. Since, the authorities below have rejected the refund applications on the ground of limitation, I do not find infirmity in such orders, as the same are in conformity with the statutory provisions.

6.2 The ratio of the judgment delivered by the constitutional Bench of Hon'ble Supreme Court in the case of Mafatlal Industries (supra) will not support the case of the appellant inasmuch as, when any provision in the statute has been held to be unconstitutional, refund of tax under such statute will be outside the scope and purview of such enactment and under such circumstances, refund can be claimed by way of a suit or by way of a writ petition. The Hon'ble Apex Court have ruled that where the tax levy is struck down as unconstitutional for transgressing the constitutional limitations, a refund claim in such a situation, cannot be governed under such taxing statute; and such claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. It was further held that in such cases, period of limitation would be calculated as per the provisions contained in clause (c) of sub-section (1) of Section 17 of the Limitation Act, 1963. In the case in hand, since the refund applications were filed by the appellant under Section 11B *ibid* and entertained by the authorities under the said provisions, as per the ratio laid down by the Hon'ble Supreme Court, the refund claim in such cases (unconstitutional levy) will fall outside

the scope and purview of the Central Excise Act, 1944. Hence, rejection of refund benefit cannot be faulted with. Therefore, the judgment relied upon by the appellant squarely covers the case in favour of Revenue for rejection of the refund application.

7. In view of the foregoing discussions and analysis, I do not find any infirmity in the impugned order passed by the Commissioner of Central Tax (Appeals-I), Mumbai. Accordingly, appeal filed by the appellant is dismissed.

(Order Pronounced in Court on 11.01.2019)

(S.K. Mohanty)
Member (Judicial)

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