

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. 88342 of 2019

(Arising out of Order-in-Appeal No. PVNS/53/RGD APP/2019-20 dated 26.09.2019 passed by the Commissioner of Central Tax, Central Excise & Service Tax (Appeals), Raigarh.)

M/s JSW Dharamtar Port Pvt. Ltd.Appellant
**JSW Centre, Bandra Kurla Complex,
Bandra (East), Mumbai – 400 051**

VERSUS

Commissioner of CGST & CX, RaigadRespondent
**4th Floor, Kendraiya Utpad Shulk Bhawan,
Plot – 01, Sector- 17, Khandeshwar,
Raigad, Maharashtra – 410 206**

APPERANCE:

Shri Abhishek Deodhar, Advocate for the Appellant
Shri S.B.P. Sinha, Superintendent, Authorised Representative for the Respondent

CORAM:

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

FINAL ORDER NO. A/86101/2022

Date of Hearing: 13.09.2022

Date of Decision: 13.09.2022

Rejection of refund claim in part to the tune of Rs.30,94,725/- erroneously paid by the Appellant as service recipient of service by way of construction, erection, commissioning or installation of original works pertaining to Port, which was exempted from service tax, and its confirmation by the Commissioner (Appeals) vide above referred order is assailed in this appeal.

2. Facts of the case, in a nutshell, is that Service Tax was collected from Appellant by M/s. Paresh and deposited by it in respect of construction service pertaining to port rendered to Appellant that was originally exempted from payment of Service Tax vide Mega exemption Notification No. 25/2012-ST at Sr. No. 14(a), but was temporarily withdrawn vide Notification dated 01.03.2015 and restored again w.e.f. 01.03.2016 by way of insertion of Sr. No. 14A Notification No. 09/2016-ST dated 01.03.2016. Inadvertently, Appellant continued to pay the Service Tax collected and paid through its service providers M/s. Paresh and after realising that no Service Tax was infect payable from the period between 01.04.2015 to 29.02.2016 that was refundable within six months of the enactment of amended Finance Act, 2016 as per proposal made in the Union Budget, 2016 and complete exemption was granted w.e.f. 01.03.2016, Appellant, as service recipient who discharged the burden of tax liability, sought for refund through its application dated 27.06.2017 but the said refund claim was rejected by Order-in-Original dated 13.02.2018 on the ground that only M/s. Paresh, who deposited the tax, can file the refund application and the refund up to 29.02.2016 was hit by the limitation of six months prescribed in the amended Finance Act, 2016. Appellant preferred an appeal before the Commissioner (Appeals) who vide Order-in-Appeal dated 05.09.2018 confirmed rejection of refund that was time barred in terms of Section 103 of the Finance Act for the period from 01.04.2015 to 29.02.2016 and remanded the matter back to the

Adjudicating Authority to verify relevant documents of the Appellant and extend the benefit of refund for the period from 01.03.2016 to 31.12.2016 involving an amount of Rs.56,87,438/- if Appellant is entitled to such claim. Accordingly, Appellant preferred appeal before the CESTAT for rejection of its refund claim up to 29.02.2016 and participated in the proceeding before the Adjudicating Authority to establish its claim of refund made for the period from 01.03.2016 to 31.12.2016. Vide Order-in-Original dated 08.02.2019 Appellant, who had discharged the incidence of tax liability, was held to be entitled to get refund in respect of invoices which were raised within one year from the date of its refund application i.e. on 28.06.2016. Accordingly, an amount of Rs.25,92,713/- was sanctioned in favour of the Appellant and refund on other invoices amounting to Rs.30,94,725/- was rejected on the ground that the same was time barred under Section 11B of the Central Excise Act in as much as the claim had been filed beyond one year from the date of invoices, hence this appeal.

3. During the course of hearing of the appeal, learned Counsel for the Appellant Mr. Abhishek Deodhar submitted that period of limitation as prescribed under Section 11B of the Central Excise Act, though applicable as far as may be to the Service Tax under Section 83 of the Finance Act, 1994, is not to be applied to the amount that was paid under mistake of law, in view of plethora of decision of rendered by this Tribunal including those reported in [2018 (9) GSTL 8 (Bom.)] in the case of *Parijat Construction*, [2012 (26) STR 195

(Kar.)] in the case of *KVR Construction*, [2019 (20) GSTL 330 (Del.)] in the case of *National Institute of Public Finance & Policy* and [2020 (1) TMI 324] in the case of *Oriental Insurance Company Ltd.*, besides the fact that refund claim of Rs.5,88,021/- was made on the basis of invoice dated 06.07.2016 which was well within the period of one year from the date of claim application filed on 27.06.2017. Further, he argued that relevant date as provided under Section 11B(5)(B) of the Central Excise Act is supposed to be date of payment of duty as mentioned in sub-clause (f) and not the date of purchase of goods by any other person as provided under sub-clause (e) basing on which Commissioner (Appeals) had confirmed the Order-in-Original. He further added that sub-clause (e) relates to sale of goods which is normally in tangible form or immovable personal property specially an article of trade or a merchandise items while, on the other hand, service as per Black's Law Dictionary and Cambridge Dictionary is an intangible commodity in the form of human efforts such as labour, skill and/or advice or a business activity that involves doing things for customers rather than producing goods and since construction service being a continuous process cannot be said to be purchased on a particular date, sub-clause (e) to Section 11B(5B) of Central Excise Act cannot be taken for the purpose of determination of relevant date for which sub-clause (f) would apply to the case of the Appellant, for which the order passed by the Commissioner (Appeals) is unsustainable in law and facts.

4. In response to such submissions learned Authorised Representative for the Respondent-Department Mr. S.B.P. Sinha argued in support of the reasoning and rationality of the order passed by the Commissioner (Appeals) and stated that since Appellant is not the person who deposited the tax before the authority, it has to be put in the category of any other person for which only sub-clause (e) would be applicable. He has also drawn attention of this Bench to the table annexed to the Order-in-Original dated 08.02.2019 and pointed out that going by the table invoice at Sr. No. 1, the date of payment of challan is clearly outside the period of limitation and being referred in Sr. No. 2 contents a date which is different from the date mentioned in the invoice and there is mismatch of amount, for which refund claim of Rs.5,88,021/- was rightly rejected and that needs no interference by the Tribunal.

5. I have perused the case record and the relevant provision contained in Rule 11B of Central Excise Act. A bare reading of sub-clause (e) would clearly reveal that in case of a person, other than the manufacturer, the date of purchase of goods would be the relevant date to determine the period of limitation. However, in the instant case Appellant had not purchased any goods but availed services and it had borne the incidence of tax. Hence for the purpose of determination of limitation the relevant date for the Appellant would fall within the definition of sub-clause (f) of Section 11(5)(B) of the Central Excise Act, for which the date of payment is material. I am, therefore, of the considered opinion that Appellant is

entitled to get refund against all those tax paid erroneously, whose challans were showing the date of payment within one year from the date of filing of refund application on dated 27.06.2017. However, having regard to the fact that some errors concerning payment detail is noticeable from the Order-in-Original, refund amount is required to be recalculated. Hence the order.

THE ORDER

6. The appeal is allowed in part and the order passed by the Commissioner of Central Tax, Central Excise & Service Tax (Appeals), Raigarh vide Order-in-Appeal No. PVNS/53/RGD APP/2019-20 dated 26.09.2019 is hereby set aside. Appellant is entitled to get refund of all service taxes paid to the Government treasury between the period from 28.06.2016 and 27.06.2017 in respect of port services under dispute here and for the limited purpose of verification of proof of payment through challan and recalculation of refund amount, the appeal is remanded back to the Commissioner (Appeals) with a direction to complete the process within two months of communication of this order and the Respondent-Department is directed to refund the recalculated amount in two months thereafter.

(Operative portion of the order pronounced in Court)

(Dr. Suvendu Kumar Pati)
Member (Judicial)