CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. I

SERVICE TAX APPEAL No. 50802 OF 2021

(Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-019-020-21-22 dated 03 May, 2021 passed by the Commissioner (Appeals), Central Excise & CGST, Bhopal)

National Fertilizers Limited **.....Appellant**
Vijaipur Unit
Guna (MP)

Versus

Commissioner CGST & Service Tax **.....Respondent**
48A, Prashashanik Kheshtra, Arera Hills
Bhopal - 462011

AND

SERVICE TAX APPEAL No. 50803 OF 2021

(Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-019-020-21-22 dated 03 May, 2021 passed by the Commissioner (Appeals), Central Excise & CGST, Bhopal)

National Fertilizers Limited **.....Appellant**
Vijaipur Unit
Guna (MP)

Versus

Commissioner CGST & Service Tax **.....Respondent**
48A, Prashashanik Kheshtra, Arera Hills
Bhopal - 462011

APPEARANCE:

Shri R. Krishnan, Advocate for the Appellant
Dr. Radhe Tallo, Authorised Representative of the Respondent

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 07.11.2022
Date of Decision: 03.01.2023

FINAL ORDER NO. 50002-50003/2023

JUSTICE DILIP GUPTA :

Service Tax Appeal No. 50802 of 2021 has been filed by M/s National Fertilizers Limited[1] to assail the order dated May 03, 2021 passed by the Commissioner (Appeals), by which the order dated July 27, 2020 passed by the Additional Commissioner rejecting the application filed by the appellant for rectification of mistake in the earlier order dated March 02, 2020 passed by the Additional Commissioner has been upheld, and the appeal has been dismissed. The amount of refund involved in this appeal is Rs. 25,18,316/-.

2. **Service Tax Appeal No. 50803 of 2021** has also been filed by the appellant to assail the order dated May 03, 2021 passed by the Commissioner (Appeals), by which the order dated July 27, 2020 passed by the Additional Commissioner rejecting the application filed by the appellant for rectification of mistake in the earlier order dated March 02, 2020 passed by the Additional Commissioner has been upheld, and the appeal has been dismissed. The amount of refund involved in this appeal is Rs. 24,32,609/-.

3. It transpires from the record that the appellant was getting supply of gas used as fuel in its factory through pipeline set up by the Gas Authority of India Limited[2]. As supply of gas through pipeline is a taxable service under the provisions of the Finance Act, 1994[3], GAIL charged service tax. The rate for supply of gas was determined by the

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1 the appellant
2 GAIL
3 the Finance Act

Petroleum and Natural Gas Regulatory Board[4]. Thus, GAIL charged provisional rates subject to finalization by the Board. The rates were finally revised downwards retrospectively by the Board with a direction that the rates already charged shall be mutually adjusted. GAIL issued credit notes for the basic rates only and for the higher tax collected, it directed the appellant to file refund claims. The appellant, accordingly, filed three refund claims, which are as follows :

Period	Amount Involved
20.11.2008 to 15.06.2010	Rs. 1,95,37,953/-
20.11.2008 to 15.09.2010 (for gas supplied by BPCL)	Rs. 25,18,316/-
20.11.2008 to 15.09.2010 (for gas supplied by IOCL)	Rs. 24,32,609/-

4. The said refund claims were rejected by the Additional Commissioner by three separate orders dated October 24, 2011, October 24, 2011 and September 29, 2011. The appeal filed by the appellant before the Commissioner (Appeals) against the aforesaid three orders was rejected by a common order dated March 14, 2012 on the ground of limitation and unjust enrichment. The appellant filed three appeals (Service Tax Appeal No's. 843, 844 and 845 of 2012) before the Tribunal which were allowed by a common order dated October 27, 2017. The Tribunal held that the applications were filed within time and with regard to the issue of unjust enrichment the Tribunal found that the accounts as well as the supporting certificate issued by the Chartered Accountant would show that the concept of

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4 the Board

undue enrichment would not apply. The accounts of the appellant for this purpose were, therefore, direct to be verified by adjudicating authority and the Tribunal after setting aside the impugned order passed by the Commissioner (Appeals), remanded the matter to the adjudicating authority for a fresh decision. It further transpires that the Department filed an Appeal bearing no. 96 of 2018 before the Madhya Pradesh High Court against the decision of the Tribunal insofar as it concerned the refund involving Rs. 1,95,37,953/- in Service Tax Appeal No. 843 of 2012. The Madhya Pradesh High Court allowed the appeal filed by the Department by judgment dated August 28, 2019 holding that the appellant had not produced any documentary proof to establish that it had not passed on the burden of tax to the customers in response to the show cause notice. Thus, the order passed by the Tribunal was set aside. The relevant portion of the judgment of the Madhya Pradesh High Court is reproduced below:

> "16……**There is no material on record to establish that the assessee has not passed the burden of tax to their customers in response to the show cause notice**. The order rejecting the claim for refund reveals discarding of Chartered Accountant's certificate dated 27-5-2011 AB/AC3 that as per the provisions of Section 12B, the Noticee are required to submit documentary proof that incidence of tax has not been passed on to any other person. No such proof has been provided by them. **The entry of recoverable amount of Service Tax shown in their Books of Account as per the Chartered Accountant Certificate dated 27-5-2011 of Shri Pawan Rathi does not prove that incidence has not been passed on to the ultimate buyer of their manufactured products**. The fact is that the Noticee has been using the gas purchased by M/s. NFL, the transportation of which was

done by M/s. GAIL is subjected to Service Tax and claimed to have paid Service Tax thereon the said gas were used in or in relation to manufacture of fertilizers. The said fertilizers are sold at the subsidized rates as per Government Policy and the differential cost with certain element of profit is paid by the Government to such fertilizer manufacturers. **The Noticee have not provided any documentary proof to show that while working out the cost of production of their product and claiming subsidy from Government, they have not added, in the cost of production of their product, the element of Service Tax which sought to be refunded. Hence, the assertion of the Noticee that they have themselves borne the incidence of tax is not acceptable as not supported by documentary evidence, therefore, refund cannot be granted to the Noticee**.

25. When the findings, rather conclusions only, in paragraph 6 of the impugned judgment are tested on the anvil of above analysis, it leaves no iota of doubt that the Tribunal has grossly erred in law in holding that the claim for refund rejected for the reason being time-barred, should be treated as within time and the "claims are to be processed", which deserves to be and is hereby set aside.

26. Even shifting the burden on the department to find out as to whether the assessee has not passed the burden of tax on the final consumer cannot be countenanced in the given facts of present case.

27. ……**The impugned order passed by the CESTAT is set aside. The order passed by the Assistant Commissioner and its affirmation are upheld**."

(emphasis supplied)

5. No appeal was filed by the Department before the Madhya Pradesh High Court against the rejection of the refund claims of Rs.

25,18,316/- and Rs. 24,32,609/- in Service Tax Appeal No. 845 of 2012 and Service Tax Appeal No. 844 of 2012 respectively.

6. Pursuant to the order of remand, the refund applications filed by the appellant for refund of Rs. 25,18,316/- was rejected by the Additional Commissioner by order dated October 01, 2019, while the refund application for refund of Rs. 24,32,609/- was rejected by the Additional Commissioner by an order dated October 04, 2019. In respect to the application filed for refund of Rs. 1,95,37,953/-, the adjudicating authority relied upon the judgment of the Madhya Pradesh High Court and held that there was no material on record to establish that the appellant had not passed the burden of tax to the customers. The adjudicating authority also considered decisions of the Supreme Court to reject the refund applications.

7. The appellant thereafter filed applications for rectification of mistake in the order dated October 01, 2010 and October 04, 2010 passed by the Additional Commissioner rejecting the two refund claims. These two applications were rejected by two separate orders dated July 27, 2020 holding that there was no mistake apparent from the record which needed to be rectified and, in fact, the arguments which were advanced could be raised by the appellant it filed an appeal before the Tribunal.

8. Feeling aggrieved, the appellant filed two appeals before the Commissioner (Appeals), who, by a common order dated May 03, 2021, rejected both the appeals and upheld the order passed by the adjudicating authority. The Commissioner (Appeals) also observed that the order passed by the Additional Commissioner rejecting the

applications filed for rectification of mistake was justified as no mistake apparent from the face of record was pointed out. The Commissioner (Appeals) also referred to decisions which held that rectification of mistake does not envisage rectification of an alleged error of judgment. According to the Commissioner (Appeals), the nature of rectification that was sought was a matter which could be agitated before the Tribunal in an appeal and not by way of an application.

9. These two appeals have been filed to assail this order dated May 03, 2021 passed by the Commissioner (Appeals).

10. All that has been submitted by Shri R. Krishnan, learned counsel for the appellant is that the Additional Commissioner failed to notice that the Department had not filed appeals before the Madhya Pradesh High Court against the orders passed on the refund applications in these two matters and only one appeal was filed in connection with the refund of an amount of Rs. 1,95,37,953/-. Learned counsel, therefore, submitted that the order passed by the Tribunal in this matter relating to refund of Rs. 25,18,316/- and Rs. 24,32,609/- had attained finality and, therefore, the Additional Commissioner could not have examined the matter in the light of the judgment of the Madhya Pradesh High Court, which judgment related to refund of Rs. 1,95,37,953/. This, according to the learned counsel, was an error apparent from the face of record which needed to be rectified. The submission advanced was, therefore, Commissioner (Appeals) committed an illegality in upholding the order passed by the Additional Commissioner.

11. Dr. Radhe Tallo, learned authorized representative appearing for the Department, however, supported the impugned order.

12. It is not possible to accept the contentions advanced by the learned counsel for the appellant. It is not in dispute that the issues that arose in all the three appeals were identical. It is true that the Department had filed one appeal only before the Madhya Pradesh High Court in connection with the refund claim of Rs. 1,95,37,953/- in Service Tax Appeal No. 843 of 2012 and no appeal was filed in relation to the refund claim of Rs. 25,18,316/- and Rs. 24,32,609/- which were the subject matter of Service Tax Appeal No. 845 of 2012, and Service Tax Appeal No. 844 of 2012 presumably for the reason that the amount involved was below the monetary limit fixed by the Government for filing appeal. However, what needs to be noticed is that the Tribunal had passed a common order and it is this order which was in appeal before the Madhya Pradesh High Court. The findings of the Tribunal have been reversed and the order passed by the adjudicating authority has been upheld. It cannot, therefore, be urged by the learned counsel for the appellant that the Additional Commissioner committed an illegality in rejecting the refund applications filed for refund of Rs. 25,18,316/- and Rs. 24,32,609/-. It needs to be noted that the appellant had not filed any appeal to assail the order passed by the adjudicating authority and only applications for rectification of the alleged mistake in the orders were filed. The Additional Commissioner could have taken a possible view that the judgment of the Madhya Pradesh High Court would govern the issue relating to refund and examined the two applications in the light of the observations made by the Madhya Pradesh High Court. Such a view could have been corrected in an appeal, but not by way of an

application filed for rectification of an alleged mistake. The two appeals were, therefore, rejected by the Commissioner (Appeals).

13. There is, therefore, no merit in the present two appeals and they are, accordingly, rejected.

(Order Pronounced on **03.01.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

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