

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,  
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

**SERVICE TAX Appeal No. 11236 of 2014-SM**

[Arising out of Order-in-Original/Appeal No AHM-SVTAX-000-APP-289-292-13-14 dated 24.12.2013 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD]

**Erweka India**

**.... Appellant**

Plot No. 29, Survey No. 415, Sarkhej-bavla Road,  
Village : Moraiya, Taluka : Sanand, AHMEDABAD  
GUJARAT - 382213

*VERSUS*

**Commissioner of Central Excise & ST, Ahmedabad**

**.... Respondent**

7 th Floor, Central Excise Bhawan, Nr. Polytechnic  
Central Excise Bhavan, Ambawadi, Ahmedabad,  
Gujarat-380015

**APPEARANCE :**

Shri Jigar Shah, Advocate & Shri Nitesh Jain, CA for the Appellant  
Shri Ajay Kumar Samota, Superintendent (AR) for the Revenue.

**WITH**

- (i) SERVICE TAX Appeal No. 11237 of 2014 (Erweka India)**
- (ii) SERVICE TAX Appeal No. 11238 of 2014 (Erweka India)**
- (iii) SERVICE TAX Appeal No. 11239 of 2014 (Erweka India)**

[Arising out of Order-in-Original/Appeal No AHM-SVTAX-000-APP-289-292-13-14 dated 24.12.2013 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD]

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)**

DATE OF HEARING : 10.02.2023

DATE OF DECISION: 23.03.2023

**FINAL ORDER NO. A/10508-10511 / 2023**

**RAMESH NAIR :**

The issue involved in the present case is whether the appellants refund filed after one year from the relevant date is hit by limitation in terms of Section 11B of Central Excise Act, 1944.

2. The brief facts of the case are that the appellant had bonafide belief that their services being related to export of goods is not taxable, written a letter dated 25.06.2007 that even though they believe that their services

dose not come under service tax net, they decided to take the registration and started paying service tax. They have also stated in the said letter that till clarification on the issue that whether their service is taxable, their payment of service tax may be considered under protest. Thereafter, whatever service tax they have paid, they filed refund claim before the sanctioning authority. The sanctioning authority rejected the claim on the time limit. Being aggrieved by the order-in-original, they filed appeal before the Commissioner (Appeals) who has also rejected the appeals. As regards the said letter of under protest before the Commissioner (Appeals), he opined that the said letter was not submitted before the Adjudicating Authority therefore, the same cannot be entertained at the appellate stage being after-thought and the claim was rejected. Therefore, the appellants filed the present appeals.

3. Shri Jigar Shah, learned Counsel along with Shri Nitesh Jain, learned Chartered Accountant appearing on behalf of the appellants submits that even though refund was filed after one year from the relevant date but right from beginning, at the time of registration, the appellant declared to the department vide letter dated 25.06.2007 that though they are making payment of service tax under protest till the clarity of issue whether the service is taxable or otherwise. He submits that, in view of the letter of protest, refund cannot be time-barred as provided under Section 11B of Central Excise Act, 1944 clearly establish that appellant have paid service tax under protest. Proviso to Section 11B reads as under:-

**“Section 11B. Claim for refund of duty and interest, if any, paid on such duty -**

(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount

of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :

**Provided** that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :

**Provided [further]** that the **limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.**

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

**Provided** that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

**Provided** further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2). (3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette. (5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of

**Explanation.** - For the purposes of this section, -

- (A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
- (B) "relevant date" means, -
- (a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -
    - (i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or
    - (ii) if the goods are exported by land, the date on which such goods pass the frontier, or
    - (iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;
  - (b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;
  - (c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;
  - (d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;
  - (e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;
  - (ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;
  - (eb) in case where duty of excise is paid provisionally under this Act or the rules made there under, the date of adjustment of duty after the final assessment thereof;
  - (ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;
  - (f) in any other case, the date of payment of duty."

From the above proviso under Section 11B(1), the period of one year will not apply if the assessee paid duty under protest. In the present case also, it is not in dispute that service tax was paid under protest therefore, the limitation of one year is prima-facie not applicable. However, before the Adjudicating Authority the appellant have not produced the letter under protest dated 25.06.2007, the learned Commissioner (Appeals) also rejected the submissions of the appellant regarding this under process letter on the ground that it is an after-thought as the same was not produced before the original authority. I completely disagree with the contention of learned Commissioner (Appeals) in this regard. I find that this letter is of dated

25.06.2007 and it cannot be said that it is an after-thought. Learned Commissioner (Appeals) should have considered this letter and passed a reasoned order on this issue which he fails to do so. Since the letter was produced before the Adjudicating Authority, I am of the view that matter should be remanded to the Adjudicating Authority to pass a fresh order after considering the under protest letter dated 25.06.2007. Accordingly, the impugned orders are set-aside and the appeals are allowed by way of remand to the Adjudicating Authority.

*(Pronounced in the open court on 23.03.2023)*

**(Ramesh Nair)**  
**Member (Judicial)**

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