IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No.40765 of 2013

(Arising out of Order in Appeal No. 320/2012 dated 21.12.2012 passed by the Commissioner of Central Excise (Appeals), Madurai)

M/s. JVS Export **Appellant**
32, Sarojini Street
Chinna Chokkikulam
Madurai – 625 002.

Vs.

Commissioner of GST & Central Excise **Respondent**
Central Revenue Building
Lal Bahadur Shastri Marg
Bibikulam, Madurai – 625 002.

APPEARANCE:

Shri G. Shiva Kumar, Chartered Accountant for the Appellant
Shri N. Sathyanarayanan, AC (AR) for the Respondent

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Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40534/2023

Date of Hearing : 30.06.2023
Date of Decision: 05.07.2023

This is an appeal filed against Order in Appeal No. 320/2012 dated 21.12.2012 passed by the Commissioner of Central Excise (Appeals), Madurai.

2. The facts of the case are that the appellants are manufacturers of woven fabrics such as kitchen terry towel, dish cloth etc. They are paying Service Tax under Reverse Charge Mechanism (RCM) on the foreign Agents Commission used for the export of goods. They filed, a refund claim under the provisions of Notification No. 17/2009-ST dated 7.7.2009 on 6.7.2010 for refund of service tax of Rs.25,44,209/- paid by them under the category of business auxiliary service on the

commission paid to their foreign agent. They have subsequently modified the amount to Rs 25,33,516/- being the actual amount of Service Tax paid. A Show Cause Notice was issued to them proposing rejection of the said refund claim on the ground that the said business auxiliary service was not specified under the said notification. The appellants in their reply to the notice requested that the refund claim be split into two portions. Rs.16,74,856/- of the claim pertaining to the period before 7.7.2009 to be processed under notification 41/2007 dated 6.10.2007 and the other portion of refund claim of Rs.8,58,660/- pertaining to the period from 7.7.2009 to be processed under Notification No. 18/2009-ST dated 7.7.2009 for which they were otherwise also eligible for refund under Rule 5 of the CENVAT Credit Rules, 2004. After due process of law, the Original Authority split the refund as requested but rejected the refund claim of Rs.16,74,856/- on the ground that the impugned claim was not filed within six months stipulated under Notification No. 41/2007-ST dated 6.10.2007. He rejected the other portion of the refund claim of Rs.8,58,660/- on the ground of absence of any provision for refund under the Notification No. 18/2009-ST dated 7.7.2009. He rejected the claim of Rs.8,58,660/- also under Rule 5 of CENVAT Credit Rules, 2004 for failure of the appellants to comply with the various conditions stipulated under the Notification No. 5/2006-CE (NT) dated 14.3.2006 which was issued under the said Rule. Aggrieved by the rejection of the refund claim by the original authority, the appellants filed an appeal before Commissioner (Appeals) who after examining the matter has upheld the Order in Original and rejected the appeal. Hence this appeal.

3. No cross objections have been filed by the respondent department.

4. I have heard Shri G. Shiva Kumar, learned Chartered Accountant on behalf of the appellant and Shri N. Sathyanarayanan, learned AC (AR) for the respondent.

5. The learned consultant for the appellant submitted that they are registered for payment of service tax as a recipient of services under the category of Goods Transport Agency Service and Business Auxiliary Service under reverse charge mechanism. Since they are exporters of goods, they are eligible for refund of service tax paid on input services under Notification No. 41/2007-ST dated 6.10.2007 upto 6.7.2009 and thereafter as per Notification No. 17/2009-ST and 18/2009-ST both dated 7.7.2009. The appellant has paid service tax as a recipient of service in the commission paid to foreign agents as detailed below:-

Date of Payment	Amount (In Rs.)
06.07.2009	7,27,440.00
05.10.2009	6,54,383.00
06.01.2010	2,38,679.00
31.03.2010	4,10,959.00
31.03.2010	5,02,055.00
Total	**25,33,516.00**

Hence their appeal can be divided into two segments i.e. on or before 6.7.2009 for Rs.1,27,440/- and paid under reverse charge mechanism from 6.7.2009 for Rs.18,06,076/-. The refund application was filed on 6.7.2010 i.e. one year from the date of payment of tax under reverse charge mechanism. Their refund application was rejected on the ground that the refund has not been filed within six months from the end of the quarter of the date of export of goods under the new Notification i.e. No. 17/2009-ST. He has prayed that as per the case laws relied by him, the time limit to file refund has to be calculated

from the date of payment of tax under reverse charge mechanism and not the actual quarter of export. The eligibility to refund itself arises only after payment and consequently the limitation cannot start prior to the crystallization of the right to receive the refund. In the case of the refund under Notification No. 41/2007-ST which provided a period of six months for filing refund claim, it has been held in a series of cases that the time limit of one year as per section 11B of the Central Excise Act, 1944 would apply and that the Notification cannot prescribe a lower time limit than granted by the section. Further, Notification No. 18/2009 granted exemption upfront on the commission and the tax paid by them in excess was by mistake and as an abundant caution following the earlier procedure adopted by them, this mistaken payment cannot be denied as a refund under section 11B itself. He prayed that the impugned order may be set aside and the appeal be allowed.

6. He relied upon the following orders in his favour:-

i. Balkrishna Textiles Pvt. Ltd. Vs. CCE, Ahmedabad – 2022 (6) TMI 613 – CESTAT AHMEDABAD

ii. Core Minerals Vs. Commissioner of Service Tax, Chennai – 2023 (2) TMI 945 – CESTAT CHENNAI

iii. Coromandel Stampings & Stones Ltd. Vs. CCE, Hyderabad – 2016 (7) TMI 780 – CESTAT HYDERABAD

iv. M/s. VST Industries Ltd. Vs. CCE, Hyderabad – 2017 (10) TMI 24 – CESTAT HYDERABAD

v. M/s. Bhansali International Vs. CCE, Jaipur – 2019 (7) TMI 773 – CESTAT NEW DELHI

vi. CCE, Kolhapur vs. Menon Exports – 2018 (4) TMI 666 – CESTAT MUMBAI

7. The learned AR Shri N. Sathyanarayanan has reiterated the points given in the impugned order and requested that the impugned order may be upheld.

8. I have heard both the parties and have gone through the rival contentions. I find that the issue relating to the time limit set by Notification No. 41/2007 has been examined by this Bench in the case of **Core Minerals** (supra) wherein it has been held as under:-

> "10.2 After considering rival contentions, we hold that both the appeals filed by the parties stand covered by the decision of the Hon'ble Apex Court (supra), wherein the Hon'ble Apex Court has categorically held that the time limit prescribed under the substantive legislation, namely, Section 11B, is applicable. We also note that even the subsequent subordinate legislation in the form of Notification No. 17/2009 dated 07.07.2009 has prescribed time-limit of one year."

I agree with the views above as section 11B of the Act is a substantive provision of the statute while a notification is only part of a subordinate legislation and cannot override the parent statute.

9. Secondly, the issue as to when the time limit of one year has to be calculated was also examined by a coordinate Bench of this Tribunal in **Balkrishna Textiles Pvt. Ltd.** (supra) wherein it was held that the relevant date of computing six months under Notification 41/2007-ST is to be taken on the date when service tax is paid and not from the first day of the month following the quarter in which the export is made. The relevant paragraph of the order is extracted below:-

> "4.1. As issue has already been settled in favour of the appellant wherein it has been held that the 'relevant date' for computing six months periods under Notification No. 41/2007-ST to be taken the date when service tax paid and not first day of month following quarter in which export made. Therefore, merely on the ground of limitation refund cannot be rejected. In the light of the above cited decisions in the case of Pacific Leather Finishers (supra) we hold that the refund claim is within time."

10. I am in agreement with both the decisions above and hold that the time limit should be construed accordingly.

11. With respect to the claim of refund by the appellant as per Notification No. 17/2009 dated 7.7.2009, wherein they have paid the duty by mistake instead of availing duty exemption and are now

seeking refund. I find that duty has been paid under mistake of law because they followed the pattern of the earlier exemption Notification No. 41/2007 dated 6.10.2007, but when they realized their mistake, they have claimed a refund of duties paid. The refund of the same paid under a mistake, cannot be denied to them, when the claim is filed within time as per section 11B. The Hon'ble Supreme Court in its judgement in **Share Medical Care Vs Union of India** [2007 (209) E.L.T. 321 (S.C.)] held as under;

> "15. From the above decisions, it is clear that even if an applicant does not claim benefit under a particular notification at the initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage."

This being so I find that the appellants are eligible for the duty paid mistakenly when they were eligible for exemption under Notification 17/2009-ST dated 07/07/2009.

12. Since I find that the appellant is eligible for exemption under notification No. 17/2009-ST dated 07.07.2009, the issue of failure of the appellants to comply with the various conditions stipulated under the Notification No. 5/2006-CE (NT) dated 14.3.2006, issued under Rule 5 of CENVAT Credit Rules, 2004 does not survive.

13. Based on the facts as discussed above, I find that the refund claim to have been filed within time and is liable to be sanctioned as per law. I hence set aside the impugned order and allow the appeal with consequential relief, as per law.

(Pronounced in open court on 5.7.2023)

(**M. AJIT KUMAR**)
Member (Technical)

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