

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
NEW DELHI**

PRINCIPAL BENCH – COURT NO. IV

**SERVICE TAX APPEAL No. 51143 of 2022**

(Arising out of Order in Appeal No. IND-EXCUS-000-APP-030-2021-22 dated 30.06.2021 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Indore)

**M/s. Pappu Construction**

03-Chauhan Bhawan Compound,  
Vikhroli West,  
Mumbai-400083.

**...Appellant**

**Versus**

**Commissioner C. & C. Excise**

Ujjain Commissionerate,  
29, Bharatpuri Administrative Area,  
Ujjain – 456010 (M.P.)

**....Respondent**

**APPEARANCE:**

Mr. Z.U. Alvi, Advocate for the appellant

Mr. Mahesh Bhardwaj, Authorized Representative for the Respondent

**CORAM : HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)**

Date of Hearing: **03.08.2022**

Date of Decision: **29.08.2022**

**FINAL ORDER No. 50782/2022**

**DR.RACHNA GUPTA**

Present appeal has been filed to assail the order in appeal No.30-2021-22 dated 30<sup>th</sup> June, 2021 vide which the order rejecting the refund claim for an amount of Rs.4,63,934/- has been confirmed. The facts in brief giving rise to impugned appeal are as follows:-

The appellants are engaged in providing mining services to M.P. State Mining Corporation Ltd. Acting on an intelligence that the inquiry was initiated by Directorate of Central Excise Intelligence Regional Unit, Indore and it was observed that the

appellants have provided taxable service since 1<sup>st</sup> June, 2007 to 31<sup>st</sup> March, 2011 at Megnagar Mines of the aforementioned Corporation. However, they neither got themselves registered nor have discharged their service tax liability for the aforementioned period. Accordingly, vide Show Cause Notice No.1301 dated 03.10.2012 Service tax for an amount of Rs.68,63,937/- was proposed to be recovered from the appellants for providing taxable mining services. The said proposal was initially confirmed vide Order-in-Original dated 07.07.2014. Being aggrieved of the said order an appeal before this Tribunal was preferred after making the payment of mandatory pre-deposit in terms of Section 35 F of Central Excise Act 1944. Vide Final order No. 51586 /2019 dated 14.11.2019 the aforesaid Order in Original dated 07.07.2014 was modified. The demand for the normal period of one year was confirmed and the Order-in-Original dated 07.07.2014 was otherwise set aside.

2. Since this Tribunal directed the Commissioner to determine afresh, within a period of three months after providing an opportunity to the appellant, to compute the amount of demand alongwith interest and penalty for the normal period of one year that the original adjudicating authority vide Order dated 07.01.2021 confirmed the demand for the normal period alongwith the interest and penalty. It is after the final order of this Tribunal that the appellant filed a refund claim for the amount of pre-deposit to the tune of Rs.4,63,934/- as was paid at the time of filing the appeal before this Tribunal against the confirmation of duty demand. The said claim was filed on 23.06.2020. However,

Assistant Commissioner, CGST and Central Excise, Rathlam has rejected the said refund claim vide Order No.03/2021 dated 12.01.2021. The appeal thereof has been rejected vide the Order under challenge. Being aggrieved the appellant is before this Tribunal.

3. It is submitted on behalf of the appellant that the issue of refund of pre-deposit consequent to the disposal of appeal before CESTAT is altogether a distinct proceeding from any proceeding with respect to the duty demand from the assessee. It is submitted that Commissioner (Appeals) has wrongly upheld the order of appropriation of the amount of refund of pre-deposit amount against the duty as has been confirmed for the normal period of impugned Show Cause Notice. Various Circulars have been relied upon by the Id. Counsel for the appellant to impress upon, the said submissions and also to impress upon the mandate for refunding the amount of deposits made in terms of section 35 F of Central Excise Act that too within a period of three months from the date of the order of the final authority/ CESTAT. With these submissions, Id. Counsel has prayed for the order under challenge to be set aside and the appeal to be allowed.

4. To rebut these submissions Id. D.R. has impressed upon the reasonableness of the findings arrived at by Commissioner (Appeals) when Commissioner (Appeals) has justified the applicability of Circular No.984/08/2014-CX dated 16.09.2014 wherein it has been clarified that in case of partial confirmation of

demand the adjustments from the deposits can be made. The appeal is accordingly prayed to be dismissed.

5. After hearing the rival contentions and perusing the record, I observe and hold as follows:-

Duty demand for an amount of Rs.2,83,436/- alongwith the interest and the penalty to such an amount as mentioned in order of original adjudicating authority dated 07.01.2021 has been confirmed against the appellant, pursuant to the final order of this Tribunal dated 14.11.2019 but for the normal period of demand and the remaining demand for extended period was set aside. Irrespective of said partial confirmation, the issue in the present adjudication is only with respect to the entitlement of the appellant to get refund the amount of pre-deposit as was made by him while filing the said appeal before this Tribunal against the OIO dated 07.07.2014. From the order under challenge i.e. Order in Appeal dated 30.06.2021, I observe following to be the findings of Commissioner (Appeals):-

*"Here it is an admitted fact that Rs. 4,63,934/ were deposited by the Appellant as pre-deposit while filing appeal before CESTAT against OIO dated 07.07.2014 Therefore when the said OIO was set aside vide Final Order dated 14.11.2019, the Appellant was entitled to refund of the said amount. In view of this settled position I find that the adjudicating authority should have decided the issue without waiting for de novo adjudication order. I find that Board vide Circular no. 984/08/2014-CX dated 16.09.2014 has clarified that in case of partial confirmation of demand such*

*adjustment can be made. However I have noted that the amount was not confirmed when refund application was filled by the appellant. The Board circular has directed field formation to adjust the amount and not to withhold the amount in anticipation of confirmed order. Due to lack of any order after de novo proceedings, I find that appellant was entitled for refund order. Once demand is confirmed then adjudicating authority was correct in adjusting the refund in terms of Board circular. However, I find that the Appellant is rightly entitled for sanction of interest as per Section 35 FF of the Act from date of payment of pre-deposit till the date of order wherein the refund has been adjusted by the adjudicating authority."*

6. Perusal makes it abundantly clear that there is no denial about the entitlement of the appellant to have the refund of the amount as was deposited by him under section 35 F of CEA, 1944. Commissioner (Appeals) has also appreciated that the apparent delay on part of original adjudicating authority for adjudicating the refund claim application of the appellant is only for the reason that the adjudicating authority wrongly waited for the outcome of denovo adjudication as far as the quantum of demand was concerned in terms of directions of final order of this Tribunal dated 14.11.2019. At this stage, I peruse the following Circulars:-

1. Circular No.802/35/2004-Central Excise dated 08.12.2022 wherein it is mentioned as follows:-

*"It is again reiterated that in terms of Hon'ble Supreme Court's order such pre-deposit must be returned within 3 months from the date of the order passed by the Appellate Tribunal/Court or other Final Authority unless there is a stay*

*on the order of the Final Authority/CESTAT/Court, by a superior Court.*

*5. Delay beyond this period of three months in such cases will be viewed adversely and appropriate disciplinary action will be initiated against the concerned defaulting officers. All concerned are requested to note that default will entail an interest liability, if such liability accrues by reason of any orders of the CESTAT/ Court, such orders will have to be complied with and it may be recoverable from the concerned officers."*

2. Circular No.1053/02/2017-CX (F.No.96/I/2017-CX.I) dated 10.03.2017 wherein it is mentioned as follows:-

Master Circular on Show Cause Notice, Adjudication and Recovery.

**"26. Refund of pre-deposits: (i)** *Where the appeal is decided in favour of the party /assessee, he shall be entitled to refund of the amount deposited along with the interest at the prescribed rate from the date of making the deposit to the date of refund in terms of Section 35FF of the Central Excise Act, 1944.*

**(ii)** .....

*(iii) If the Department contemplates appeal against the order of the Commissioner (A) or the order of CESTAT, which is in favour of the appellant, refund along with interest would still be payable as per the time limits prescribed in the law or in the order, unless such order is stayed by a competent appellate authority."*

3. Circular No.984/08/2014-CX (F.No.390/Budget/1/2012-JC) dated 16.09.2014 wherein it is mentioned as follows:-

"5. Refund of pre-deposit:

5.1. ....

5.2.....Therefore, in all cases where the appellate authority has decided the matter in favour of the appellant, refund with interest should be paid to the appellant within 15 days of the receipt of the letter of the appellant seeking refund irrespective of whether order of the appellate authority is proposed to be challenged by the Department or not.

5.3 If the Department contemplates appeal against the order of the Commissioner (A) or the order of CESTAT, which is in favour of the appellant, refund along with interest would still be payable unless such order is stayed by a competent Appellate Authority.

5.4 In the event of a remand, refund of the pre-deposit shall be payable along with interest."

4. Circular No.967/01/2013-CX (F.No.208/36/2012-CX.6) dated 01.01.2013 wherein it is mentioned as follows:-

"Sub.: -Recovery of confirmed demand during pendency of stay application – regarding

Sl.No.	Appellate Authority	Situation	Directions regarding recovery
1.	CESTAT	Appeal filed without stay application against an Order in Original issued by the Commissioner	Recovery to be initiated on filing of such an appeal, without waiting for the statutory 90 days period to be exhausted.
2.	CESTAT	Appeal filed with a stay application against an order in Original issued by the Commissioner.	Recovery to be initiated 30 days after the filing of appeal, if no stay is granted or after the disposal of stay petition in accordance with the conditions of stay , if any, whichever is earlier
3.	NIL	No appeal filed against an order in appeal issued by a	Recovery to be initiated after expiry of statutory period

		Commissioner (Appeals) confirming the demand for the first time	of 90 days for filing appeal from the date of communication of order."
--	--	---	--

5. Circular No.1035/23/2016-CX (F. No. 208/ 36/ 2012-CX.6) dated 04.07.2016 wherein it is mentioned as follows:-

2.0 .....

"3.1 However, Hon'ble High Court of Punjab and Haryana judgment in case of M/s PML Industries Ltd. Vs Commissioner of Central Excise [2013-TIOL-201-HC-P&H-CX] pronounced that during the pendency of stay, irrespective of the conduct of the assessee, no recovery could be made. In para 46, Hon'ble Court observed that:-

"...we are of the opinion that right of consideration in appeal on an application for waiver of pre-deposit, is a right conferred by the Statute and such right cannot be defeated on the basis of Circular..."

3.2 SLP filed by the Department [SLP (Civil) 765/2014] against the judgment of Hon'ble High Court of Punjab and Haryana, has been dismissed by the Hon'ble Supreme Court, thus upholding the decision of the Hon'ble High Court. The relevant observation of the Hon'ble Supreme Court while dismissing the SLP, is reproduced below:

"In view of the judgment and order passed by this Court in Commissioner of Customs & Central Excise, Ahmedabad v. Kumar Cotton Mills Pvt. Ltd [2005 (180) ELT 134 SUN Court The special leave petitions are dismissed..."

7. The perusal of these Departmental clarifications and directions, are sufficient to hold that it was a mandate upon the



Department to sanction the refund of amount as was deposited under Section 35F of Central Excise Act. The adjudicating authorities are held to have committed an error while adjusting the said amount to a confirmed duty demand. The Board circular No.984/08/2014 dated 16.09.2014 though has been relied upon, present being a case of partial confirmation of demand. The relevant para of said Circular is perused which reads as follows:-

*"In case of partial remand, where a portion of the duty is confirmed, it may be ensured that the duty due to the Government on the portion of order in favour of the revenue is collected by adjusting the deposited amount alongwith interest."*

8. The bare perusal makes it clear that even the Circular No.984/08/2014 does not speak about setting off the amount of pre-deposit as made under section 35 F against any partial confirmation of demand. With these observations, I hold that the refund claim irrespective of a confirmation of duty liability has wrongly been rejected. Appellant is entitled for the refund of the amount of pre-deposit thereof alongwith the interest at the applicable rate from the date of deposit till the date of realisation. Department is at liberty to recover the amount of demand as partially confirmed from the appellant. As a result, appeal stands allowed.

[Pronounced in the open Court on **29.08.2022**]

**(DR.RACHNA GUPTA)**  
**MEMBER (JUDICIAL)**

Anita