IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 42180 of 2013

(Arising out of Order-in-Appeal No. MAD-CEX-000-APP-052-13 dated 28.06.2013 passed by the Commissioner of Central Excise (Appeals), Lal Bahadur Shashtri Marg, C.R. Buildings, Madurai – 625 002)

Smt. Sheela Vimala Rani **: Appellant**
W/o. Shri P. Michael Raj,
30A/5, Joe Home, 1st Street,
Railor Nagar, Madurai – 625 018

VERSUS

Commissioner of Central Excise **: Respondent**
Lal Bahadur Shashtri Marg, Central Revenue Buildings,
Madurai – 625 002

APPEARANCE:

Shri G. Shiva Kumar, Chartered Accountant for the Appellant

Shri R. Rajaraman, Assistant Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 40895 / 2023

DATE OF HEARING: 22.09.2023

DATE OF DECISION: 11.10.2023

Order : [Per Hon'ble Mr. P. Dinesha]

This appeal is filed by the assessee against the Order-in-Appeal No. MAD-CEX-000-APP-052-13 dated 28.06.2013 passed by the Commissioner of Central Excise (Appeals), Madurai.

2. Heard Shri G. Shiva Kumar, Ld. Chartered Accountant for the appellant and Shri R. Rajaraman, Ld. Assistant Commissioner for the Revenue.

3. After hearing both sides and after going through the documents placed on record, we find that the only issue to be decided by us is: whether the appellant's claim for refund of Service Tax is proper and correct?

4. The appellant filed a refund claim on 06.04.2011, the date of payment of Service Tax is 26.03.2010, and there is no dispute on the above dates.

5.1 Brief facts which are relevant for our consideration are that the appellant had entered into an agreement for sale of undivided share of 19.5 cents of land and another agreement dated 17.06.2010 for construction of 1005 sq. feet flat and the said property was located within the proposed residential complex being constructed by the developer. The Department was of the view that the said residential complex was an approved project by the authority, to be constructed by the developer, and the said residential complex was not intended for personal use, which therefore was amenable to Service Tax. Further, going by the unregistered sale agreement dated 17.07.2009 and the unregistered builders agreement dated 17.06.2009, whereby a scheme plan for the construction of a group housing project and a plan for the construction of multi storey building was sanctioned by the Commissioner, Madurai Corporation, the Department

appears to have formed an opinion that the builder i.e., M/s. Max Properties Pvt. Ltd., had provided the service in relation to the construction of residential complex, for which the said builder had rightly paid the Service Tax of Rs.1,00,286/-.

5.2 The appellant-purchaser who had purchased the said flat for her personal use and who had borne the Service Tax element charged by the builder, claimed refund of the said Service Tax on the ground that the flat constructed and purchased by her was for her personal use and thus, she was entitled for the refund in view of C.B.E.C. Circular No. 108/02/2009-S.T. dated 29.01.2009.

5.3 Upon receipt of the said application, the Revenue issued a Show Cause Notice dated 04.07.2011 proposing thereby to reject the refund claim of the appellant on the ground that the payment of Service Tax by the builder was proper and in order, the time-limitation of one-year had lapsed when the application for refund dated 06.04.2011 was made and therefore the same was time-barred, the exclusion clause in terms of Board Circular No. No. 108/02/2009-S.T. (*supra*) was available only for the construction of residential complex by a person intended for personal use, it was the builder who got sanctioned the plan for construction of group housing project, which was clearly covered under the definition of 'residential complex' as defined under Section 65(91a) of the Finance Act, 1994.

5.4 In reply, the appellant appears to have explained *inter alia* that though the builder had remitted Service Tax to the Government exchequer, but the same was paid by the appellant from her pocket, even the builder had confirmed vide its certificate dated 26.04.2010 as to the inclusion of Service Tax element in the consolidated payment towards the purchase of the flat in question and since the refund claim could be filed by any person who has borne the incidence of taxation, therefore, she was entitled for the refund. The appellant also appears to have relied on an order of the CESTAT, New Delhi in the case of *Chandigarh Vayu Bharti Co-op. Society v. Commissioner of Central Excise, Chandigarh [2009 (14) S.T.R. 161 (Tri. – Del.)]*

6. During adjudication, the original authority having considered the explanation of the appellant, however, vide Order-in-Original No. MAD-CEX-000-ASC-28-12 dated 27.03.2012 rejected the same thereby confirming the proposals contained in the Show Cause Notice, holding that the claim of the appellant was not in accordance with Section 11B of the Central Excise Act, 1944.

7. It appears that the appellant preferred an appeal before the Commissioner (Appeals) who also having rejected the appellant's claim vide impugned Order-in-Appeal No. Order-in-Appeal No. MAD-CEX-000-APP-052-13 dated 28.06.2013, the present appeal has been filed before this forum.

8.1 The Ld. Chartered Accountant would submit at the outset that the very same issue was considered in the above quoted order of the CESTAT, New Delhi in the case of *Chandigarh Vayu Bharti Co-op. Society (supra)* and also by the co-ordinate Mumbai Bench in the case of *M/s. Neel Sidhi Enterprises v. Commissioner of Service Tax, Mumbai [2013-TIOL-681-CESTAT-MUM]*; the Revenue has not been able to controvert the orders of the co-ordinate Benches nor has the Revenue filed any contrary orders/judgements and hence, in the light of the consistent view expressed by co-ordinate Benches, the said view is required to be followed.

8.2 On the allegations of time-limitation, the Ld. Chartered Accountant invited our attention to paragraph 9 of the Order-in-Original wherein though the adjudicating authority has recorded the submissions of the appellant, but however, has not cared to discuss nor controvert the same. For the sake of convenience, that part of paragraph 9 of the Order-in-Original is reproduced hereinbelow: -

Her submission (on the five points noted hereinabove) is presented, in seriatim

1. The claimant submits that the refund claim was submitted on 18/03/2011 by registered post in the office of the Deputy Commissioner of central excise, Madural I vide copy of postal acknowledgement enclosed.

   This is acknowledged in letter C.No. IV/10/8/2011-STU (Refund) dated 25/03/2011, vide copy enclosed. The refund papers were returned for resubmission rectifying certain omissions pointed out.

   The claimant had vide letter dated 31/03/2011 referred to this letter and resubmitted the refund claim rectifying the defects pointed out.

9. *Per contra*, Ld. Assistant Commissioner defended the impugned order.

10.1 From the above, it is clear to us that the refund application was filed as early as in March i.e., 18.03.2011, sent by registered post and the Revenue now cannot dispute the same since, apparently, the same was returned for re-submission after pointing out mistakes in the said application. The appellant had thereafter vide letter dated 31.03.2011 re-submitted the refund claim.

10.2 In this regard, the Ld. Chartered Accountant relied on the decision of the Hon'ble Gujarat High Court and an order of this Bench, namely: -

i. M/s. Apar Industries (Polymer Division) v. Union of India [2016 (333) E.L.T. 246 (Guj.)]

ii. Ramesh Flowers Pvt. Ltd. v. Commissioner of G.S.T. and Central Excise, Tirunelveli [2022 (11) TMI 799 – CESTAT, Chennai]

to buttress his contentions.

10.3 We find that the Hon'ble Gujarat High Court has held in the above case that the time-limitation under Section 11B is to be reckoned from the date of original application for refund, which is 18.03.2011 in the case on hand. Further, it has been held that when the petitioner re-presented such rebate applications in correct form, backed by necessary documents, the same should have been seen as a continuous attempt on part of the petitioner to seek rebate. Thus seen, it would relate back to the original filing

of the rebate applications, though in wrong format. Admittedly, the date of the original refund claim is within one year as stipulated under Section 11B *ibid.*

10.4 Further, we also note that the Department has accepted the said decision of the Hon'ble Gujarat High Court vide Circular No. 1063/2/2018-CX dated 16.02.2018, by which act the said judgement of the Hon'ble Gujarat High Court has attained finality and so has the decision therein.

10.5 In view of the above, we are clear that the time-limitation for refund application under Section 11B in the case on hand is to be reckoned from the date of original filing of such application. Hence, the issue of time-bar does not arise in the case on hand and to this extent, therefore, the impugned order cannot sustain.

11.1 Section 11B – claim for refund of duty and interest, if any paid on such duty, reads as under: -

> *"(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 :

…"

11.2 The said section refers to 'any person' and admittedly, the appellant before us is the person who has borne the incidence of tax and hence, 'any person' appearing in the said section clearly covers the appellant as well. This is also for the reason that, as admitted by the builder, the builder had only remitted the tax portion paid by the appellant to the Department, and as admitted by his certificate, as having included the tax portion in the consideration received. Hence, we hold that the appellant was very much within her right to have claimed the impugned refund and further that she was also entitled for the same. Moreover, if we accept the reasons in the Order-in-Original, as upheld in the impugned order, that the builder had discharged Service Tax rightly since it was for its self-use, then the said finding clearly defies the logic behind the concept of self-service. If the construction is for the self-use of the builder, then perhaps there may not be any liability on its part to pay Service Tax, but still the Revenue consciously accepted such payment just to deny the refund to the appellant before us. Hence, the denial, as made by the adjudicating authority, which was subsequently upheld, is unsustainable for the reason that the same is without any basis, for which reason the impugned order is set aside.

12. Resultantly, the appeal is allowed with consequential benefits, if any, as per law.

(Order pronounced in the open court on **11.10.2023**)

Sd/-
(M. AJIT KUMAR)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd