IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH: KOLKATA

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 75025 of 2013

(Arising out of Order-in-Appeal Nos. 76-77/ST/BBSR-II/2012 dated 09.10.2012 passed by the Commissioner of (Appeals) Central Excise, Customs & Service Tax C.R.Building, Rajaswa Vihar, Bhubaneswar-7, Odisha.

M/s. Vedanta Aluminium Limited **: Appellant**
Village BhurkhaMunda,
Jharsuguda, Odisha, -768201

VERSUS

Commissioner of (Appeals), Central Excise Customs & Service Tax, **: Respondent**
CR Building, Rajaswa Vihar,
Bhubaneswar-751 007, Odisha.

WITH

Service Tax Appeal No. 75027 of 2013

(Arising out of Order-in-Appeal Nos. 76-77/ST/BBSR-II/2012 dated 09.10.2012 passed by the Commissioner of (Appeals) Central Excise, Customs & Service Tax C.R.Building, Rajaswa Vihar, Bhubaneswar-7, Odisha.

M/s. Vedanta Aluminium Limited **: Appellant**
Village BhurkhaMunda,
Jharsuguda, Odisha, -768201

VERSUS

Commissioner of (Appeals), Central Excise Customs & Service Tax, **: Respondent**
CR Building, Rajaswa Vihar,
Bhubaneswar-751 007, Odisha.

APPEARANCE:

Ms. Payal Bharwani, Advocate for the Appellant

Shri S. S. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 76007-76008/ 2024

DATE OF HEARING: 09.05.2024
DATE OF PRONOUNCEMENT: 05.06.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

There are two appeals filed against a common Order-in-Appeal. Service Tax Appeal ST/75025/2013 has been filed against the impugned Orders-in-Appeal No. 76-77/ST/BBSR-II/2012 dated 09.10.2012 passed by the Commissioner of (Appeals), Bhubaneswar, Odisha, involving refund amount of Rs. Rs. 75,038/-. Service Tax appeal ST/75027/2013 has been filed against the same Order-in Appeal, involving refund amounting to Rs. 2,19,447/-. As the issue involved in both the appeals are the same, they are taken up together for decision by a common order.

2. M/s. Vedanta Aluminium Ltd. ('he Appellant') is located in SEZ and is engaged in the business of manufacturing aluminium products. In the month of March 2009, the Appellant received various input services in the nature of works contract. All such services were duly utilized by the Appellant to undertake authorized operation in SEZ. The Appellant paid the consideration along with the applicable service tax thereon to the service providers after 03.03.2009 i.e., from 14.04.2009 to 10.06.2009 and 24.04.2010 to 25.06.2010.

2.1. Notification No. 4/2004-ST dated 31.03.2004 provided outright exemption from payment of service tax on taxable services provided to an SEZ developer/ unit by any service provider, for consumption within such Special Economic Zone. The said Notification was rescinded/ superseded by Notification No. 9/2009-ST dated 03.03.2009 which also extended the same benefit, but by way of refund. The said notification allows the SEZ developer/ unit to file refund of the service tax paid, if any.

2.2. As per Notification No. 9/2009-ST dated 03.03.2009, the Appellant applied for refund of service tax of Rs. 45,06,130/- (Appeal No. 1) and Rs. 1,00,33,793/- (Appeal No. 2) in respect of input services received for authorized operations of SEZ unit from 03.03.2009 to 19.05.2009 by filing of two Forms R on 15.09.2009. In respect of the two refund claims, the Appellant was denied proportionate refund of Rs. 75,038/- (Appeal No. 1) and Rs. 2,19,447/- (Appeal No. 2) vide Order-in-

Original No. (R)2 &3/Refund/S.Tax/SBP-I/2010 dated 21.04.2010, respectively, pertaining to 2 days viz. 01.03.2009 and 02.03.2009, prior to issuance of Notification No. 9/2009-ST, since such service providers had issued invoices for the entire month of March 2009.

2.3. Being aggrieved by rejection of part of the refund, the Appellant filed two fresh refund applications on 08.07.2010, by submitting that in respect of refund pertaining to 01.03.2009 and 02.03.2009, the Appellant was eligible for such refund in accordance with Notification No. 4/2004-ST, since tax was per se not payable even for the said period.

2.4. The Appellant was issued a Show Cause Notice dated 19.08.2010 proposing to deny such refund, on the ground of limitation and various other grounds. The Notice was adjudicated and the refund claims of Rs. 75,038/- and Rs. 2,19,447/- were rejected vide Orders-in-Original No. (R) 31&32/REFUND/S.TAX/SBP-I/2010 dated 30.12.2010 on the following grounds:

a. The taxable services merit exemption under Notification No. 4/2004-ST. However, such notification does not provide for grant of refund. Further, since the Appellant is a service recipient, and not a service provider, Notification No. 4/2004-ST is not applicable to the Appellant.
b. Where duty has been collected without authority of law, it ought to be refunded. However, in the absence of provision of refund, such refund cannot be allowed, even if conditions stipulated in the exemption notification are fulfilled.
c. Since the instant refund application is under Section 83 of the Finance Act read with Section 11B, which provides for a time period of 1 year, the instant application is time barred.
d. Since no appeal filed against Order-in-Original dated 21.04.2010, the order has attained finality.
e. The Appellant paid the applicable service tax to the service providers and hence, the burden of duty has been borne by the Appellant. Hence, the Appellant cannot be barred from claiming refund. However, no appeal was filed against Order rejecting refund.

2.5. While rejecting the refund claims, the adjudicating authority held that both refund applications are different and hence, refund under Notification No. 4/2004-ST has no linkage with refund under Notification No. 9-2009-ST. Hence, refund under Notification No. 4/2004-ST ought to be treated as fresh application

2.6. Appeals filed by the appellants against the said Orders-in Original were dismissed by the Commissioner (Appeals) vide impugned Order-in-Appeal No. 76-77/ST/BBSR-II/2012 dated 09.10.2012 on the following grounds:

> The appeal is only against time barring. Since the Appellant's refund claim does not involve refund of any amount paid under protest, limitation of one year prescribed under Section 11B is strictly applicable. Hence, refund claim is time barred. This is because, Notification 4/2004-ST does not provide for claiming refund, and hence, refund can be said to have been claimed only under Section 11B of Excise Act. Since the claim is filed beyond the limitation period of one year provided under Section 11B, thus, it is not admissible.

2.7. Being aggrieved against the impugned Order-in-Appeal, the Appellant has filed the instant appeal before this Tribunal.

3. The appellant submits that in the instant case, all the invoices for the month of March 2009, for which proportionate refund was denied by the department vide the Order-in-Original dated 21.04.2010, were issued post 03.03.2009, which is the effective date of Notification No. 9/2009. However, by virtue of the said Order-in-Original dated 21.04.2010, the proportionate service tax pertaining to 01.03.2009 to 02.03.2009 became an amount of tax which was collected without authority of law, inasmuch as Notification No. 4/2004-ST which was in force during such period, provided for outright exemption from service tax.

3.1. Further, Section 26(1) (e) of the SEZ Act provides that service tax is not payable on taxable services provided to SEZ Developer or Unit. Thus, once an exemption has been granted, service tax is not liable to be paid. Despite the exemption, if any service tax is paid, such service tax can be said to have been collected without authority of law.

Therefore, such service tax paid without authority of law, ought to be treated as a deposit with the Department. Accordingly, the refund claim of such amount would fall outside the purview of Section 11B of the Excise Act and no period of limitation would apply to such claim. This is specifically because, the Appellant's eligibility to exemption from service tax is not disputed.

3.2. In support of the above claim, the appellant relied on the following decisions:

a. ***Credible Engineering Construction Projects Ltd. v. Commr. of CT, Hyderabad-GST, 2022 (9) TMI 844 - CESTAT Hyderabad.***

b. ***Sujaya D. Alva v. CCE & ST, Mangalore, 2019 (28) G.S.T.L. 196 (Kar.)***

c. ***3E Infotech v. CESTAT, CCE (Appeals-I), 2018 (18) G. S. T. L. 410 (Mad.)***

d. ***Delhi Metro Rail Corporation Ltd., 2023-VIL-644-DEL***

e. ***Bansal Biscuits Pvt. Ltd. v. CCE & ST, Patna, 2023 (11) TMI 615 - CESTAT Kolkata***

3.3. Further, the appellant submits that even if the exemption is not initially claimed by an assessee, the same can be claimed subsequently by way of refund:

a. ***Mazgaon Docks Ltd. v. CC, Mumbai, 2006 (202) E.L.T. 706 (Tri. - Mumbai)***[*Pg. 47-48 of the Compilation*]

b. ***CCE v. Vikrant Tyres Ltd., 1992 (58) E.L.T. 224 (Tribunal)***

Thus, such amount paid under mistake and collected without authority of law ought to be refunded since it is not disputed that the Appellant was not liable to pay the same.

3.4. The Appellant submits that the refund has been denied on the ground that the proportionate refund claim of the Appellant is time barred in terms of Section 83 of the Finance Act read with Section 26

of the SEZ Act. Section 51 of the SEZ Act gives over riding effect to the SEZ Act over any other legislations. The appellant submits that in light of Section 51 of the SEZ Act, the Appellant being an SEZ unit is eligible to such refund as per SEZ law on standalone basis and the notifications issued under Finance Act, ibid cannot decide eligibility of exemption to SEZ units.

3.5. The appellant submits that this issue is no longer res integra. In the Appellant's own case, this Tribunal in **Final Order 75552/2024 dated 06.03.2024** has held that the refund of service tax paid to SEZ would be eligible in terms of the SEZ Act. Accordingly, they contended that the refund claim rejected on the ground of time bar is not sustainable and prayed for allowing the refund.

4. The Ld. A.R. submits that the issue before this Tribunal is not eligibility of the refund claim. The adjudicating authority has rejected the refund claim on various grounds. The appellant filed appeal challenging the refund claim on the ground of time bar alone. The adjudicating authority has earlier rejected proportional refund claim vide Order-in-Original No. (R)2 &3/Refund/S.Tax/SBP-I/2010 dated 21.04.2010. The appellant has not filed any appeal against this order. Since no appeal has been filed against the Order-in-Original dated 21.04.2010, the order has attained finality. The appellant cannot choose another route and filed a fresh refund claim which has already been rejected by the Order dated 21.04.2010. Accordingly, he submits that the refund claims have been rightly rejected by the adjudicating authority.

5. Heard both sides and perused the appeal documents.

6. We observe that as per Notification No. 9/2009-ST dated 03.03.2009, the Appellant filed two refund claims of service tax paid to the works contract service providers of Rs. 45,06,130/- (Appeal No. 1) and Rs. 1,00,33,793/- (Appeal No. 2) in respect of such input services received for authorized operations of SEZ unit from 03.03.2009 to 19.05.2009. The Ld. adjudicating authority passed the Order-in-Original No. (R)2 &3/Refund/S.Tax/SBP-I/2010 dated 21.04.2010,

sanctioning part of the refund claims and rejected refund pertaining to 2 days viz. 01.03.2009 and 02.03.2009, prior to issuance of Notification No. 9/2009-ST, since such service providers had issued invoices for the entire month of March 2009. The appellant has not challenged this Order-in-Original and hence this order has attained finality.

6.1. If the appellant is aggrieved against the order for rejecting the refund for the two days, they would have filed appeal against the order dated 24.04.2010. Instead, the appellant has chosen another route and filed a fresh refund claim for the same period, which has already been rejected by the Order dated 21.04.2010. Since no appeal has been filed against the order-in-original dated 21.04.2010, it attained finality.

6.2. The appellant has relied upon various decisions of the Hon'ble High courts and Tribunals and contended that Notification. 4/2004-ST which was in force during such period 01.03.2009 and 02.03.2009 provides outright exemption from service tax and hence the amount of service tax paid can be considered as deposit. There is no time limit applicable for refund of amount deposited. We find that the issue involved in the present appeal is not eligibility of the refund claim. The refund claim for 01.03.2009 and 02.03.2009 has already been rejected by a speaking order dated 21.04.2010. Since the appellant has not filed appeal against the said order, it has attained finality. Thus, the fresh refund claim filed by the appellant is for the same period for which the claim has already been rejected and the rejection has attained finality. In view of the above, the decisions cited by the appellant are not relevant to the facts and circumstances of the present case.

6.3. We also observe that the appellant themselves claimed that they have paid the consideration after 03.03.2009 i.e., from 14.04.2009 to 10.06.2009 and 24.04.2010 to 25.06.2010. Thus, in their own admission, the invoices were not issued during the period when Notification 4/2004-ST was in operation. The finding of the adjudicating authority in the impugned order dated 21.04.2010 cannot be a reason for them to state that the services were rendered when Notification 4/2004-ST was in operation. If the findings of the adjudicating authority is wrong or not acceptable to them, the only recourse

available to them was to file appeal against the order dated 21.04.2010, which they have not done. Now, they cannot take a stand contrary to their own submission that the considerations were paid after 03.03.2009.

6.3. In view of the above discussions, we hold that the adjudicating authority has rightly rejected the fresh refund claim, which has already been rejected vide order dated 21.04.2010 and the rejection has attained finality. Accordingly, we do not find any infirmity in the impugned order and hence, we uphold the same.

7. The appeals filed by the appellant are rejected.

(Order Pronounced in Open court on 05.06.2024)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

RKP