CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70415 of 2020

(Arising out of Order-in-Appeal No.16-ST/APPL/LKO/2020 dated 23.01.2020 passed by Commissioner (Appeals) Customs, GST & Central Excise, Lucknow)

M/s Welldone Infrastructure Pvt. Ltd., ...Appellant
(1st Floor, Halwasiya Court, MG Marg,
Hazratganj, Lucknow-226001)

VERSUS

Commissioner of Customs, GST &
Central Excise, Lucknow ....Respondent
(3/194, Vishal Khand, Gomtinagar, Lucknow)

APPEARANCE:

Shri Abhishek Tripathi, Advocate & Ms. Ayushi Dangre, Advocate for the Appellant
Shri Sandeep Pandey, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.- 70120/2024

DATE OF HEARING : 14 November, 2023
DATE OF DECISION : 11 March, 2024

P. K. CHOUDHARY:

The present appeal has been filed by the Appellant assailing the Order-in-Appeal dated 23.01.2020 passed by the learned Commissioner (Appeals) Customs, GST & Central Excise, Lucknow.

2. The facts of the case in brief are that the Appellant had undertaken construction of a Mall-cum-multiplex, project under the name and style of "One Awadh Centre[1]", situated at Vibhuti Khand Gomti Nagar, Lucknow. That, in response to an application Form submitted by one Mrs. Bina Halwasiya[2], the Appellant entered into a transaction of sale/provisional allotment of commercial/retail space, Unit 1(B) located on 3rd Floor of the

[1] Project
[2] Allottee

project, having Super Area 8286.45 sq. ft. (approx), alongwith the right to exclusive usage of parking spaces in the project, in favour of the said allottee, through an allotment letter dated 20.07.2015 for total sale consideration of Rs.4,44,98,237/- plus service tax as per applicable rates. That, against the above amount receivable, the Appellant received Rs.3,00,00,000/- and since the said amount was inclusive of service tax, hence the Appellant paid service tax to the tune of Rs.12,09,213/- by debiting its Cenvat credit ledger on 30.07.2015. That, subsequently the allottee through her letter dated 15.11.2017, expressed her inability to pay balance amount of the total sale consideration and service tax, and thus requested the Appellant to cancel the booking of the impugned unit i.e. Unit 1 (B) in the project, and to make refund of Rs.3,00,00,000/- without any deductions whatsoever. Accordingly, the Appellant refunded the said amount on 01.02.2018, vide NEFT to her. That, the allottee acknowledged receipt of the refund of Rs.3,00,00,000/- and gave a No Dues Certificate. That, since the transaction of sale/provisional allotment entered into with the impugned allottee was cancelled and the amount involved was repaid/refunded back to the allottee by the Appellant, henceforth Appellant filed the refund application in Form-R on 25.09.2018 for claiming the refund of Rs.12,09,213/- which was paid by it in the past by debiting its Cenvat credit ledger on 30.07.2015 in respect of the amount collected and refunded to the allottee. Show cause notice date 21.12.2018 was issued. The Appellant replied to the SCN. The learned Adjudicating Authority rejected the refund claim mentioning that the date of payment as shown in the ledger account is 30.07.2015 and the submission of the party that cause of action for claiming refund is 31.01.2018, as the relevant date is the date of payment of duty in terms of explanation to Section 11B of the Central Excise Act, 1944. Hence refund claim filed on 25.09.2018 is barred by limitation.

3. Being aggrieved, the Appellant filed appeal before the first Appellate Authority and the learned Commissioner (Appeals) held as under:-

> *"5. I have gone through the case record. There is no dispute that the claimed amount of service tax was paid on 30.07.2015 and refund thereof was claimed on 25.09.2018. As per section 11B of the Central Excise Act, the refund claim was to be filed before expiry of one year from the relevant date. As per the Explanation (B) (f) under the said section, relevant date in this case is date of payment of duty. Thus, the refund claim is clearly time barred. There is no merit in the appeal and the same is dismissed."*

4. Being aggrieved, the Appellant has filed the present appeal before the Tribunal.

5. The learned Advocate appearing on behalf of the Appellant submits that in Union of India vs. ITC Ltd. as reported at 1993 Supp. (4) SCC 326, the Supreme Court upheld the view taken by the Division Bench of the Delhi High Court with regard to the question of limitation. On the question of limitation, the Division Bench of the Delhi High Court had observed that "the duty of excise is that which is levied in accordance with law" and that "any money which is realised in excess of what is permissible in law would be a realisation made outside the provisions of the Act." That, the cause of action for filing the refund claim arose when the amount was refunded by the Appellant to its allottee, hence the date of reckoning the limitation is to be started from the date of refund of service tax amounts to its allottee. Thus, in the instant case the whole issue centers around the provisions of Section 11B and clause (f) of the explanation B to Section 11B and the same have been considered by the Hon'ble High Court of Gujrat in the case of Indo-Nippon Chemicals Co. Ltd. vs. Union of India, as reported at 2002 (2) TMI 136 - Gujrat High Court. Their Lordships while interpreting the provisions of clause (f) to explanation B of Section 11B held as under:-

> *"35. For the purpose of commencement of limitation under Clause (f) of Explanation (B) to Section 11B of the Act, even though reversal of Modvat credit was done in February/March 1995, since the mistake was discovered*

only in November, 1995 when the Public Notice clarifying the legal position came to the knowledge of the petitioner, the period of limitation for the purpose of refund application would commence from November, 1995 i.e. on discovery of mutual mistake of the parties. In the circumstances, we hold that provisions of Section 11B of the Act are attracted to the refund application filed by the Petitioner. On the question of limitation, our conclusion is that since the claim is based on discovery of mistake, the period of limitation would not commence from the date of reversal of Modvat credit, but from the date when the mistake committed mutually of wrong reversal of credit by the parties was discovered in November, 1995. The refund claim has therefore to be held to be within time." (**emphasis supplied**)

That, it will not be out of place to submit that the Revenue being aggrieved by the said judgement of the Hon'ble Gujrat High Court, took it up to the Hon'ble Supreme Court in special leave petition, which was dismissed by the Hon'ble Supreme Court as reported at 2005 (186) E.L.T. A117 (SC). That, in the facts and circumstances of the case and in law, since service did not materialize, they are entitled for refund in terms of Rule 6 (3) of the Service Tax Rules, 1994, that when an agreement is cancelled or no service provided, the tax paid originally becomes a deposit and the amount would lose the identity of Service Tax and hence, for claiming refund of such amount, Section 11B of the Central Excise Act, 1944 would not apply.

6. Learned Departmental Representative justified the impugned orders and prayed that the appeal filed by the Appellant be dismissed being devoid of any merits.

7. Heard both sides and perused the appeal records.

8. I find that the following issues are required to be examined in the facts and circumstances of the present appeals:

a) Whether the refund applications filed by the Appellant were proper and accordingly, whether the refund of the

amounts claimed by the Appellant ought to have been granted?

b) Whether the Ld. Commissioner (Appeals) was correct in observing that there is no provision under the GST Laws, which provides for refund of the service tax deposited by the Appellant?

9. Before I proceed to examine the issues enumerated above, I find that when these matters had come up for hearing on 09.11.2022, this Tribunal had observed that the issue whether this Tribunal can decide upon issues pertaining to refund claims of taxes paid under the erstwhile laws, filed under the GST regime, had been referred to the Larger Bench of this Tribunal in the case of M/s Bosch Electrical Drive India Private Limited v. Commissioner of Central Tax bearing Service Tax Appeal No.40010 of 2020.

10. I find that the issue has since been decided by the Larger Bench of this Tribunal vide Interim Order No.40021/2023 dated 21.12.2023. The relevant portion of the said order is reproduced below:-

> *"43. It now needs to be examined whether the Tribunal would have the jurisdiction to entertain an appeal filed against an order passed under sub-section (3) of section 142 of the CGST Act.*
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> *44. Under sub-section (3) of section 142 of the CGST Act, the claim for refund of any amount of CENVAT credit has to be disposed of in accordance with the provisions of the existing law. The existing law would be Chapter V of the Finance Act and the Central Excise Act. If an application for refund of CENVAT credit had been filed at a point of time when the CGST Act had not been enacted, an appeal would lie before the Tribunal against an order passed on the application filed for refund of CENVAT credit. What has to be seen is whether an appeal can be filed before the Tribunal after the coming into force of the CGST Act against an order passed under sub-section (3) of section 142 of the CGST Act. In view of the specific provisions of sub-section (3) of section 142 of the CGST Act, every claim for refund after 01.07.2017 has to be disposed of in accordance with the provisions of the existing law i.e. Chapter V of the Finance Act and the Central Excise Act. This would mean that the appellate provisions would continue to remain the same. This position is also explicit from the provisions of sub-section (6)(b) of section 142 of the CGST Act, wherein it has*

been provided that every proceeding of appeal, review or reference relating to recovery of CENVAT credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of the existing law.

45. Section 174(2)(f) of the CGST Act also provides that the repeal of the Central Excise Act under section 174(1) and amendment of the Finance Act under section 173 shall not affect any proceedings including that relating to an appeal instituted before, on or after the appointed day under the said amended Act or repealed Acts and such proceedings shall be continued under the said amended Act or the repealed Acts as if the CGST Act had not come into force and the said Acts had not been amended or repealed.

46. There is, therefore, no manner of doubt that an appeal against an order passed under section 142 of the CGST Act would lie to the Tribunal.

47. This view also gains support from the fact the legislative intent could not have been to deprive either an assessee or the Revenue from the right of an appeal since an appeal against an order passed under section 142 of the CGST Act would not lie to the Appellate Tribunal constituted under the CGST Act.

48. The Division Bench of the Tribunal, while referring the matter to the Larger Bench had observed in paragraph 14.1 that an appeal would lie under section 112 of the CGST Act to the Appellate Tribunal constituted under the provisions of the CGST Act against an order passed under sub-section (3) of section 142 of the CGST Act. As noticed above, an appeal would not lie before the Appellate Tribunal constituted under the provisions of the CGST Act because an appeal lies only against an order passed either under section 107 or section 108 of the CGST Act.

49. In the present case, the service tax was paid under the provisions of Chapter V of the Finance Act and refund was claimed under sub-section (3) of section 142 of the CGST Act, under which the claim was required to be disposed of in accordance with the provisions of the existing law. Therefore, even if the service tax had been deposited by the appellant after 01.01.2017, nonetheless the refund of any amount of the CENVAT credit could be claimed only under subsection (3) of section 142 of the CGST Act and against this order an appeal will lie to the Tribunal.

50. The reference is, accordingly, answered in the following manner:

> *An appeal would lie to the Customs, Excise & Service Tax Appellate Tribunal against an order passed under* section 142 of the Central Goods and Services Tax Act, 2017.

51. The papers may now be placed before the Division Bench of the Tribunal for deciding the appeal."

> Therefore, as held by the Larger Bench, this Tribunal exercises jurisdiction over issues of refund claims filed under Section 142 of the CGST Act, 2017. In the present matters, the refund applications had been filed under Section 11B of the Central Excise Act, 1944 read with Section 142(5) of the CGST Act, 2017.

11. At the outset, I observe that the two conditions, which are sacrosanct to any refund application, are that (i) such refund application ought to be filed within the prescribed period of limitation and (ii) the incidence of duty should not have been passed to any other person by the applicant.

12. I find that the aspect of limitation in the facts and circumstances of the present matters, has already been decided by this Tribunal in the following cases, whereby it was held that the time limit prescribed under Section 11B of the Central Excise Act, 1944 cannot be invoked to reject a refund claim filed under Section 142(5) of the CGST Act, 2017:

a) Wave One Private Limited v. Commissioner [2023 (11) TMI 1078 - CESTAT New Delhi]
b) Jai Mateshwaari Steels Pvt. Ltd. v. Commissioner, CGST Dehradun [2022 (3) TMI 49 - CESTAT New Delhi]

Accordingly, I hold that the refund applications filed by the Appellant are not time barred. I find that the party has claimed refund of service tax amounting to Rs.12,09,213/- paid on the booking of unit which has been later cancelled by them and booking amount was refunded to their client. As per copy of Ledger Account of Service Tax payable for the period 01.07.2015 to 31.07.2015 submitted by the party, there is debit entry of service tax amounting to Rs.13,81,800/- (including Rs.12,09,213/- against advance received from Mrs. Bina Halwasiya). As per ST-3 return filed by the party for the period April, 2015 to September, 2015, the party has utilized Cenvat Credit amounting to Rs.13,81,800/- during the month of July, 2015 for payment of Service Tax. Hence, it may be inferred that, service tax amounting to Rs.13,81,800/- (including

Rs.12,09,213/-) has been paid by the party by the way of reversal of Cenvat Credit.

13. I find that it is the case of the Appellant that of cancellation of agreement for purchase of the unit 1(B) in the project is to be considered as none provision of services under Rule 6 (3) of Service Tax Rules, 1944. It is further submitted that in post GST Regime, there is no mechanism available to claim such credits [as specified in Rule 6 (3) ibid] in GST returns and therefore the only remedy available with them is to claim refund of such service tax. The learned Advocate further submits that in the absence of any services, Appellant cannot be burdened with the service tax liability.

14. The first principle of service tax is that tax is to be paid on those services only which are taxable under the said statute. But for that purpose there has to have some 'service'. Unless service is there, no service tax can be imposed. For the applicability of the provisions as referred to in the deficiency memo or in the Adjudication order or the appellate order, the pre-condition is 'service'. If any service has been provided which is taxable as specified in the Finance Act, 1994 as amended from time to time then certainly the assessee is liable to pay, but when no such service has been provided then the assessee cannot be saddled with any such tax and in that case the amount deposited by the assessee with the exchequer will be considered as merely a 'deposit' and keeping of the said amount by the Department is violative of Article 265 of the Constitution of India which specifically provides that "No tax shall be levied or collected except by authority of law." Since Service Tax, in issue, received by the concerned authority is not backed by any authority of law, the Department has no authority to retain the same. Buyer booked the flat with the Appellant and paid some consideration. The Appellant as a law abiding citizen, entered the same in their books of account and paid the applicable service tax on it after collecting it from the buyer. But when the buyer cancelled the said booking on which service tax has been paid and the

Appellant returned the booking amount along with service tax collected, then where is the question of providing any service by the Appellant to that customer. The cancellation of booking coupled with the fact of refunding the booking amount along with service tax paid would mean as if no booking was made and if that is so, then there was no service at all. If there is no service then question of paying any tax on it does not arise and the Department can't keep it with them. No law authorises the Department to keep it as tax. The net effect is that now the amount, which earlier has been deposited as tax, is merely a deposit with the Department and the Department has to return it to the concerned person *i.e.* the assessee. In the fact of this case it can be safely concluded that no service has been provided by the Appellant as the service contract got terminated and the consideration for service has been returned.

15. As per Rule 66E(b) (sic) of Service Tax Rules, 1994 in construction service, service tax is required to be paid on amount received from buyers towards booking of flat before the issuance of completion certificate by the competent authority and the booking can be cancelled by the buyer any time before taking possession of the flat. Once the buyer cancelled the booking and the consideration for service was returned, the service contract got terminated and once it is established the no service is provided, then refund of tax for such service become admissible. The authorities below are not correct in their view that mere cancellation of booking of flats does not mean that there was no service. If the booking is cancelled and the money is returned to the buyer, then where is the question of any service?

16. I find that the Appellant had collected service tax from the allottees and had duly deposited such service tax with the Revenue. Subsequently, on cancellation of the bookings/allotments, the allottees were entitled to the entire invoice amount paid by them, including the service tax amount and the Appellant was eligible to avail Cenvat credit in respect of

the service tax amount so deposited by it as per Rule 6(3) of the ST Rules. The said Rule provides for availment of Cenvat credit of the excess service tax paid by an assessee against a service which was ultimately not provided for any reason. I find that in the present cases, the Appellant could not provide services to the allottees on account of cancellation of the bookings made by them. This aspect is not in dispute.

17. I find that the credit/refund of the excess service tax paid by the Appellant was a right that had accrued in favour of the Appellant and therefore, as per Section 174 of the CGST Act, 2017, such right of the Appellant ought to be upheld and protected. Further, Section 142(5) of the CGST Act, 2017 contemplates the very situation as in the present appeals and accordingly, provides for refund of taxes paid under the erstwhile Laws.

18. In view of the facts of this case and the discussions held in the preceding paragraphs, I am of the considered view that the Appellant is entitled for refund and the appeal is accordingly allowed with consequential relief, as per law.

(Order pronounced in open court on – **11th March, 2024**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

LKS