CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 20259 of 2021

[Arising out of Order-in-Appeal No. COC-EXCUS-000-APP-519-2020 dated 22/12/2020 passed by the Commissioner of Central Tax, Central Excise & Customs, Cochin (Appeals)]

Kerala Ex-Servicemen Welfare Association
Sainik Ashram, 3rd Floor, Sainik Ashram Road, Kusumagiri P.O
Cochin - 682 030
Kerala

Appellant(s)

VERSUS

Commissioner of Central Tax & Central Excise, Cochin
C.R. Buildings, I.S Press Road
Cochin - 682 018
Kerala

Respondent(s)

Appearance:
Shri G. Natarajan, Advocate for the Appellant
Shri P. Gopakumar, Additional Commissioner (AR) for the Respondent

CORAM:
HON'BLE SHRI P. DINESHA, JUDICIAL MEMBER

Final Order No. 20096 / 2022

Date of Hearing: 21/02/2022
Date of Decision: 22/03/2022

Per : P. DINESHA

A brief factual background leading to the present appeal, are that the appellant filed a refund application dated 03/07/2018 for refund of Rs. 3,09,596/- (Rupees Three Lakhs

Nine Thousand Five Hundred and Ninety Six only) consequent to the order of this Bench in Final Order No. 21328/2017 dated 03/08/2017, wherein, this Bench had remitted the matter back to the adjudicating authority, to reconsider the issue afresh including the law laid down by the Hon'ble High Court of Kerala in the case of ***Geojit BNP Paribas Financial Services Ltd. Vs. C.C.E., Cus. & S.T., Kochi – 2015 (39) S.T.R. 706 (Ker.).*** Thereafter, the adjudicating authority reconsidered the refund claim of the appellant afresh and after recording his satisfaction as to the appellant's claim being within the period of limitation, has recorded the finding as under:

> *"8……The Central Board of Excise and Customs vide Paragraph 5.3 of the Excise Manual of Supplementary instructions, 2005 has clarified that "No refund/rebate claim should be withheld on the ground that an appeal has been filed against the order giving the relief, unless stay order has been obtained." I find that as the CESTAT Final Order has been accepted by the Committee of Commissioner's, the refund has to be granted to the applicant if otherwise eligible.*
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> *9. Based on the above findings it is evident that the appellant had discharged excess service tax liability without availing the benefit of Notification No. 30/2012 ST for the period 05.09.2012 to 05.09.2013 and also paid back the amount of excess service tax collected by them from their service recipient. Accordingly the applicant is eligible for refund of service tax paid Notification No. 30/2012 ST dated 06.09.2004 consequent to*

the CESTAT Final Order No. 21328/2017 dated 03.08.2017….."

Aggrieved by the above order of the adjudicating authority, the Revenue filed an appeal before the Commissioner of Central Tax, Central Excise and Customs, Kakkanad Division, Kerala wherein the following grounds of appeal was urged:

"…. a. The Order-in-Original records no findings as regards the matter dealt with in the Order-in-Appeal passed by the Hon'ble CESTAT. Paragraph 8 of the order speaks of the claim being filed within one year of order of the Hon'ble CESTAT. The examination and finding required was whether the original claim was filed within the period of limitation or not in the light of the judgment of Hon'ble High Court of Kerala in ***Geojit*** *case. The Order-in-Original is silent on this aspect and to that extent is non-speaking"*

and thus sought for setting aside the impugned Order-in-Original (refund). The assessee also filed its cross-objections supporting the sanction order of refund. After hearing both the parties, the Commissioner (Appeals) vide impugned Order-in-Appeal has allowed the Revenue's appeal and thereby set aside the sanction order on the ground that the same Hon'ble High Court of Kerala in the case of ***Southern Surface Finishers Vs. Asstt. Commr. of C. Ex., Muvattupuzha – 2019 (28) G.S.T.L. 202 (Ker.)*** has held that the decision in ***M/s. Geojit BNP Paribas Financial***

Services Ltd. (supra) was not a good law. It is relevant here to note that the remand order by this Bench was an open remand, with a direction to consider the applicability of the decision in ***Geojit BNP*** (supra) and the adjudicating authority has also considered the matter on merits as well, as it could be seen from paragraph 9 of the Order-in-Original No. 73/2018 dated 23/08/2018 (supra).

2. In a subsequent decision, in the case of ***Uniroyal Marine Exports Ltd. Vs. CCE, Kozhikode - 2021 (54) G.S.T.L. 156 (Ker.),*** the Hon'ble Kerala High Court has held that once the amounts have been refunded to the assessee as per the order of the original authority, the Revenue would have to recover the amounts from the assessee, which cannot be treated as tax due and hence, the Hon'ble Court has held that though the question of law was answered in favour of the Revenue but the Revenue was incapable of recovery of the amounts refunded as tax due. Thus, the Hon'ble Court put a restraint on the Revenue from recovering the amounts refunded which decision is squarely applicable to the facts in the present case as well. Going by the above ratio in the case of ***Uniroyal Marine*** (supra), it is held that even if the Revenue is correct, but still, the recovery cannot be made.

3. In the case of ***M/s. Way2wealth Brokers Pvt. Ltd. Vs. CCT, Bangalore - 2021-VIL-770-KAR-ST,*** the Hon'ble jurisdictional High Court of Karnataka had an occasion to consider a similar dispute and the Hon'ble High Court after considering its own earlier decision in the case of ***CCE, Bangalore Vs. KVR Construction - 2012 (26) S.T.R. 195 (Kar.) - 2010-VIL-78-KAR-ST*** and the relevant provision of the statute, has held as under:

".....14. Considering 11B of the Act, 1944, a co-ordinate Bench of this Court in the case of Commissioner of Central Excise V. KVR Construction (supra), has held thus:

"18. From the reading of the above Section, it refers to claim for refund of duty of excise only, it does not refer to any other amounts collected without authority of law. In the case on hand, admittedly, the amount sought for as refund was the amount paid under mistaken notion which even according to the department was not liable to be paid."

It has been thus observed that what one has to see is whether the amount paid by the assessee under a mistaken notion was refundable. Mere payment made by the assessee will neither validate the nature of payment nor the nature of transaction. The same could not make it a service tax. When there is a lack of authority to collect such service tax not liable to be paid by the assessee, it would not give the Department the authority to retain the amount paid by the assessee. Therefore, mere nomenclature would not be an embargo on the right of the petitioner to demand refund of payment made under a mistaken notion. This judgment has been confirmed by the Hon'ble Apex Court dismissing the appeal filed by the Revenue. Having regard to the facts and circumstances of the case, this judgment is

squarely applicable to the case on hand."

In view of the above decision of the Hon'ble Jurisdictional High Court of Karnataka, the action of the adjudicating authority in sanctioning refund is held to be in order.

4. In view of the above, I am of the view that the Commissioner (Appeals) has erred in his impugned order by setting aside the sanction of refund which is contrary to the decision in ***M/s. Way2wealth*** (supra) and which is also not recoverable, as held in ***Uniroyal Marine*** (supra) and therefore, the impugned order is set aside and the appeal is allowed.

(Order pronounced in the Open Court on **22/03/2022**)

(P. DINESHA)
JUDICIAL MEMBER

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