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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Decided on : 30.08.2016

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SERTA 6/2015 & C.M.No.28127/2015

PRINCIPAL COMMISSIONER OF SERVICE TAX, DELHI-I

..... Appellant

Through: Mr.Harpreet Singh, Sr.Standing
Counsel

versus

T.T. LIMITED

..... Respondent

Through: Mr.Bimal Jain and Ms.Shilpi Jain
Sharma, Advocates

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

1. The question of law urged by the revenue in this appeal pertains to the correctness of the tribunal's order whereby it directed the adjudicating authority to sanction the respondent/assessee's refund claim after verifying the documents.

2. The brief facts are that the respondent is an exporter of manufactured cotton yarn. It sought refund on the strength of Notification No.41 of 2007, as amended by later Notifications Nos.17/2008, 3/2008 and 33/2008. The adjudicating authority in the first instance rejected the claims; the matter was remitted by the appellate commissioner upon which the refund was partly granted to the tune of ₹8.48 lakhs. The assessee once again appealed. In the

course of the appeal, the commissioner – in the order-in-appeal dated 02.09.2011, held that substantial exports of the assessee were eligible for service tax refund – approximating ₹43.44 lakhs. The commissioner, however, remitted the matter for working out the refund claims having regard to the document particulars. Specific directions were issued to the adjudicating authority to examine the documents and co-relate them as to whether the assessee could claim the amounts. The adjudicating authority by its order dated 06.11.2012 held that the assessee was ineligible for the refund claim. In doing so, the adjudicating authority reasoned that services in respect of which input duty refund claim was made were included not with effect from 06.10.2007 (when the base notification i.e. 41/2007 was issued) but from later dates – substantial amounts claimed were related to Notification No.33/2008 dated 07.12.2008. The assessee's appeal was rejected by the commissioner. In the circumstances, it approached the tribunal which by the impugned order was of the opinion that the adjudicating authority could not adjudicate upon the refund claim afresh. The CESTAT also examined the correctness of the reasoning by the adjudicating authority and held that even otherwise since the base notification i.e. 41/2007 was amended and various services in respect of which refund was claimed by the assessee were in fact included, there was nothing expressly stated to prohibit their application for the periods in question. The operative portion of the CESTAT's reasoning is extracted below:

9. In this case, I find that the adjudicating authority has taken the new ground to adjudicate the refund at the time of

verification of certain documents which is also not permissible in law. As the show cause notice was issued to the appellant in the matter has already attained finality by the order of the Commissioner (Appeals) on 02.09.2011. If at all, the adjudicating authority wanted to re-examine all the refund claims, the adjudicating authority is required to be issue fresh show cause notice which the adjudicating authority has failed to do so. In the circumstances, the order dated 02. 09.2011 has attained finality as held by the Apex Court in the case of ITC Ltd., Revenue has not preferred any appeal against that order. In the circumstances, the adjudicating authority has no right to re-examine the refund claim but only can verify the documents as directed by the Commissioner (Appeals).

10. On merits also I have considered the issue. In the Notification No.41/2007, there is no condition that if the services availed prior to the date of notification, the appellant are not entitled to refund claim as held by the Hon'ble Bombay Court in the case of WNS Global Service Pvt.Ltd. (supra). Relying on the judgement of Hon'ble Allahabad High Court in the case Addi Industries Ltd., the contention of the ld.AR that the conditions of the notification are required to be fulfilled by the appellant, I find that in the case of Addi Industries Ltd.(supra), the condition of the notification was that refund claim is to be filed within the prescribed time but there is no condition in the notification that if the services availed prior to insertion of services as notified services in the notification No.41/2007, refund is not admissible. Therefore reliance on the case of Addi Industries (supra) is not acceptable as the facts of that case are different to the present case.

11. In the circumstances, I set aside the impugned order and direct the adjudicating authority to sanction the refund claim on verification-of the documents as directed by the Commissioner (Appeals) vide his order dated 02.09.2011 within the period 90 days of the receipt of this order.

3. The revenue which is in appeal contends that the CESTAT's reasoning is untenable. It relies upon the text of the amending notifications, particularly the terms of Notification No.17/2008 and Notification No.33/2008 both of which clearly state that the amendment would come into force upon the date of publication in the Official Gazette. It is also contended that the base notification (No.41/2007) itself superseded the earlier notification (i.e. No.40/2007 dated 17.09.2007). That notification had listed only services. The subsequent base notification clearly saved only those actions which had actually been done or omitted to be done. Reliance is placed upon the term "except as respect things done or omitted to be done before such supersession". Thus, it was urged that the benefit of refund notifications, was only in respect of services made after their publication. Learned counsel relied upon the decisions of the Supreme Court in *Commissioner of Customs, Bangalore vs. Spice Telecom* 2006 (203) ELT 538 (S.C.) and *Jay Mahakali Rolling Mills vs. Union of India* 2007 (215) ELT 11 (S.C.). It is pointed out that these two judgments enunciatively ruled that unless subsequent notification which amends an earlier exemption or inclusion contains a clear phrase pointing to the notification Relating back, the courts would give effect to it only from the date of their publication or issuance. It was submitted that *Jay Mahakali Rolling Mills'* case (*supra*) rejected the arguments that the inclusion of a notification even if it were by retrospective amendment should be construed only as clarificatory.

4. Counsel for the respondent urged firstly that the tribunal's order does not require interference. It is pointed out in this regard that the impugned order is in consonance with the judgement of the CESTAT, West Zonal Bench, Mumbai in ***WNS Global Services (P) Ltd. vs. Commissioner of Customs and Excise, Mumbai* 2008 (10) STR 273**. Learned counsel points out that an identical fact situation, the refund claim which was made in respect of services that were subsequently included, was upheld. Reliance was placed upon the view of the CESTAT which was confirmed by the High Court. The CESTAT had stated that unless there is an express stipulation in the amendment of a legal notification that it would apply for exports prospectively, it is deemed to apply for exports effected in the past as well so long as they are after the base notification. Learned counsel highlights that since the amending notification adds to the base notification, it should be construed as clarificatory. He also relies upon the judgment of the Supreme Court reported as ***Commissioner of Central Excise vs. Sesa Goa Ltd.* 2015 (321) ELT A66 (SC)**. It also relied upon the opinion of the CESTAT in its judgment i.e. ***Commissioner of Central Excise vs. Sesa Goa Ltd.* 2014 (299) ELT 221 (Mum.)**. It was next urged that the adjudicating authority exceeded the scope of the remand and thereby violated the law. Counsel contended that neither in the original proceeding nor even on the first remand was the issue of entitlement or eligibility of the assessee to claim the refund ever put to it. In the circumstances, the adjudicating authority could not have in the pretext of working out the remand by the commissioner, who had all but allowed the refund claims, revisit the eligibility. In short,

learned counsel emphasised the principle of finality to say that the adjudicating authority was precluded from examining eligibility of the services on the ground that some of them were included by later notification. It is lastly argued that what is of relevance is not the date when the service gets included in the base notification or through an amendment but whether the services included is part of an exemption notification or one in which refund can be claimed against when the application is made.

5. The essential facts relating to the concerned notifications are that the first notification No.40/2007 was issued on 17.09.2007. That notification spelt out four services. It was superseded by Notification No.41/2007 on 06.10.2007. Thus the base notification for the first time included 12 services. Subsequent notifications kept adding to the list – these included Notification No.3/2008 (19.02.2008), 17/2008 (01.04.2008) and 33/2008 (07.12.2008). Significantly, both the base notifications superseded the earlier notification and saved only what was “done or omitted to be done before the supersession”. The tenor of the base notification is also discernible by words that “*the Central Government on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in column (3) of the Schedule (hereinafter referred to as specified services) received by an exporter and used for export of goods (hereinafter referred to as said goods), from the whole of the service tax leviable thereon under section 66 and section 66A of the said Finance Act, subject to the conditions specified in the corresponding entry in column (4) of the Schedule.*” It is quite apparent that the

intent of the notification was only to save firstly what had been done or omitted to be done – in respect of the services that were included and secondly also to grant the benefit of the notifications of included services thereafter as is apparent from the use of the word “hereby”. This view gets support from the subsequent notifications – 17/2008 and 33/2008 both of which clearly state that they would come into force on the dates of their publication in the official gazette.

6. The assessee relies upon the ruling in **WNS Global Services (P) Ltd.** (*supra*) and the CESTAT judgment in **Sesa Goa Ltd.**’s case (*supra*) which was confirmed by the Supreme Court to contend that the beneficial notification which includes goods, articles or services as subjects of rebate, exemption of duty, refund etc. should be construed liberally. It is alternatively argued that these notifications – which amended the base notifications, were merely clarificatory. The judgment of the Supreme Court in **Commissioner of Central Excise, New Delhi vs. Hari Chand Shri Gopal 2010 (260) ELT 3 (SC)** is an authority for the proposition that a clarificatory notification can be said to relate back to a point of time having regard to its terms. That seems to be the premise of CESTAT’s decision in **Sesa Goa Ltd.**’s case (*supra*) which was affirmed by the Supreme Court.

7. In this case, however, the original notification i.e. 40/2007 which was revised by base notification specified only few amongst several as the services for which refund claim could be made. The list was augmented subsequently in 2008 by three separate notifications each of which were expressly prospective. The terms of notification

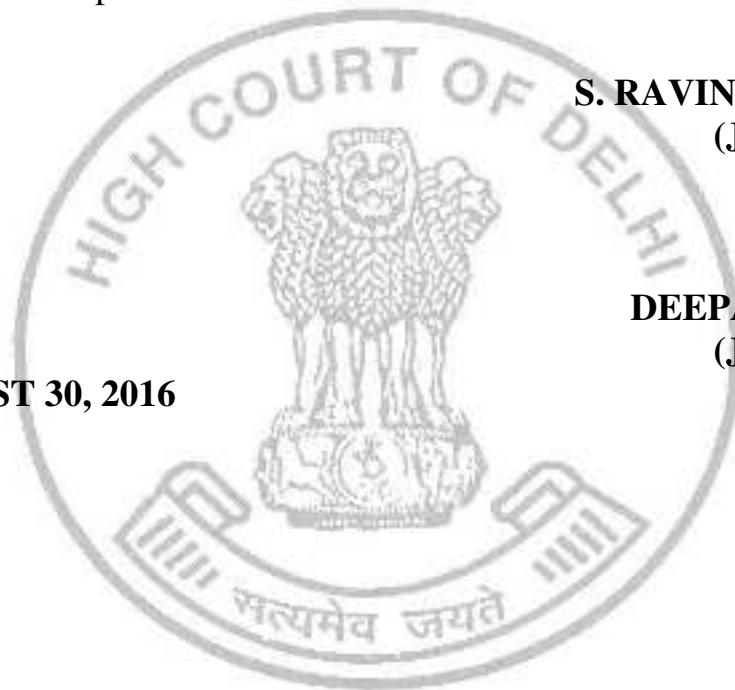
in this case are such that it would rule out their clarificatory nature as is contended on behalf of the assessee. To say that notification is clarificatory, there should be something enunciated in the original or base notification itself. To illustrate the *Sesa Goa Ltd.*'s case (supra) the judgment in *M/s W.P.I.L. Ltd., Ghaziabad vs. Commissioner of Excise 2005 (181) ELT 359 (SC)* it was considered that *Sesa Goa Ltd.*'s case (supra) dealt with pumps. The revenue had sought to urge that the amendment of the original notification applied prospectively. The Supreme Court negated the contention and held that the assessee's argument that both power pressing pumps as well as part of pressing pumps used for manufacturing during the entry having exempted having regard to tenure of the original notification itself. Here facts are entirely different. Specific services relatable to export were included but not all. Others were included and notified on separate specific dates. In the circumstances, the assessee's contention that the subsequent notifications were merely clarificatory and must be held to relate back or apply from the date the base notification came into force, cannot be accepted. The CESTAT reasoning is therefore incorrect. As far as the assessee's submission that the adjudicating authority could not have increased scope of remand is concerned, whilst the submission has some merit, this Court notices that at least in two places, where the Commissioner remitted the matter for verification, the scope of the remit was widened. Having regard to the fact that exemption and refund applications are to be construed strictly and narrowly which has been dealt with [Refer *Commissioner of Central Excise, New Delhi vs.*

Hari Chand Shri Gopal 2010 (260) ELT 3 (SC)], it cannot be said that the adjudicating authority lacked primary jurisdiction merely because of a circumscribed demand as being contended by the assessee. This contention too therefore fails.

8. For the above reasons, we are of the opinion that the impugned order cannot be sustained. It is accordingly set aside.

10. The appeal is allowed in the above terms. Pending application also stands disposed of.

AUGUST 30, 2016
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S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)