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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CENTRAL EXCISE APPEAL NO. 306 OF 2016

1. M/s Parijat Construction

having Registered office at, 8,
Ratanmanohar Sankul, Near Holkar
Bridge, Opp. Sunder Narayan Bridge,
Ravivar Peth, Nashik – 422 002.

...Appellant

Versus

**1. Commissioner of Central Excise
Nashik,**

Plot No. 155, Sector P-34, NH – Jaishtha
& Vaishakh, CIDCO, Nashik – 422 008.

...Respondent

WITH

CENTRAL EXCISE APPEAL NO. 16 OF 2017

1. M/s Giriraj Construction

having its Registered office at, 1, Suyojana
Apartment, Vise Mala, Canada Corner,
Nashik – 422 002.

...Appellant

Versus

**1. Commissioner of Central Excise
Nashik,**

Plot No. 155, Sector P-34, NH – Jaishtha
& Vaishakh, CIDCO, Nashik – 422 008.

...Respondent

Mr. B.J. Raichandani, with Mr. Anshul Jain, for the Appellant.
Mr. M. Dwivedi, with Ms. Shalaka Gujjar, for the Respondent.

CORAM: **A.S. OKA &
RIYAZ I. CHAGLA, JJ.**

JUDGMENT RESERVED ON 4TH SEPTEMBER 2017

JUDGMENT PRONOUNCED ON 13TH OCTOBER 2017.

ORAL JUDGMENT :- (Per Riyaz I. Chagla J.)

1. The Appellants by the present Appeals are challenging a common order dated 5th May 2016 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Branch at Mumbai (for short “**Appellate Tribunal**”) by which the Orders-in-Appeal Nos. AKP/104/NSK/2009 and AKP/104/NSK/2009, both dated 18th November 2009 passed by the Commissioner (Appeals) of Central Excise and Customs, Nashik were upheld. For the sake of convenience, we are referring to the facts in Appeal No. 306 of 2016.

2. The Appellant is engaged in providing “Commercial or Industrial Construction” service and are registered as a service provider under that category. The Appellant had during the period May 2006 to November 2007 secured a

contract from Mumbai Educational Trust for construction of administration and Core Course building. The Appellant being under the *bonafide* belief that the transaction attracts service tax paid the same without collecting the same from the customer and deposited it to the credit of the Central Government. The Appellant filed a refund claim on 11th March 2008 for Rs.12,62,900/-. The refund claim was filed as the Appellant had provided construction services for use of organisation or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for purposes of profit and were thus exempted as per the department clarification issued under para 13.2 of CBEC circular No. 80/10/2004-ST dated 17th September 2004. A show cause notice dated 30th May 2008 issued to the Appellant by the Assistant Commissioner to show cause as to why the Appellant's claim for refund shall not be rejected. The Appellant filed a detailed reply to the show cause notice. The Assistant Commissioner vide Order-in-Original No. 05/ST.(R)/2009 dated 31st March 2009 rejected the refund claim for Rs.9,73,292/- filed by the Appellant as not been sustainable on account of the refund

claim being time barred under the provisions of Section 11 B of the Central Excise Act, 1944. The refund claim of Rs. 2,89,608/- was allowed. The Appellant being aggrieved and dissatisfied with the said orders filed Appeal before the Commissioner of Central Excise (Appeals), Nashik. By Order-in-Appeal dated 18th November 2009, the Commissioner (Appeals) partly allowed the Appeals of the Appellant to the extent of Rs.73,330/- and for the remaining amounts the Orders-in-Original were upheld. The Appellant filed Appeal before the Appellate Tribunal challenging the said order of the Commissioner (Appeals). By the impugned order dated 5th May 2016, the Appellate Tribunal dismissed the Appeal filed by the Appellant. Hence the present Appeal has been filed.

3. Mr. Raichandani, learned counsel for the Appellant has submitted that Section 11 B of the Central Excise Act which prescribes the time period of one year for filing a refund claim is inapplicable in the case of refund for service tax which was paid under mistake of law. Mr. Raichandani has further submitted that the Appellate Tribunal has erroneously applied Section 11 B of the said Act in the present case where

admittedly the Appellant had paid service tax on commercial or industrial construction service though such service was not leviable to service tax. The Appellate Tribunal has arrived at an erroneous finding that since refund of any amount is governed by Section 11 B, there would be no other provision of limitation for filing a refund claim and that the Appellate Tribunal being a creature under the Central Excise / Customs Act cannot go beyond the statute and relax time prescribed under the statute. The Appellate Tribunal rejected the refund claim of the Appellant on the ground that it was filed after one year and hit by limitation and thereby the upheld the orders of the Commissioner (Appeals). Mr. Raichandani has relied upon a judgment of the Division Bench of this Court in ***Hindustan Cocoa Products Vs. Union of India***¹ and another judgment of Division Bench of this Court (Nagpur Bench) in the case of ***The Commissioner Central Excise, Nagpur Vs. M/s. SGR Infratech Ltd.***² in support of his contention that, the limitation prescribed under Section 11 B of the said Act is not applicable, where admittedly the tax

1 1994 (74) ELT 525 (Bom.)

2 Central Excise Appeal No. 26 of 2014 dated 28th October 2015.

could not have been demanded and / or service tax was paid under a mistake of law. Mr. Raichandani has also submitted that the Supreme Court order relied upon by the Appellate Tribunal viz. **Collector of C.E., Chandigarh Vs. Doaba Co-Operative Sugar Mills**³ would not be applicable as an exception has been culled out in cases where duty was paid under the mistake of law. In the present case where admittedly the Appellant had paid service tax on Commercial or Industrial Construction Service although such services were not liable to service tax.

4. Mr. Dwivedi learned counsel for the Respondent has supported the impugned order. Mr. Dwivedi contended that limitation prescribed under Section 11 B under the said Act is applicable to all refund claims and since the refund claims of the Appellant was filed beyond one year from the date of payment of service tax, the refund claim was correctly held by the Appellate Tribunal to be hit by limitation.

3 1988(37) E.L.T. 478 (S.C.).

5. We are of the view that the issue as to whether limitation prescribed under Section 11 B of the said Act applies to a refund claimed in respect of service tax paid under a mistake of law is no longer *res integra*. The two decisions of the Division Bench of this Court in ***Hindustan Cocoa (Supra)*** and ***Commissioner of Central Excise, Nagpur V/s. M/s. SGR Infratech Ltd. (Supra)*** are squarely applicable to the facts of the present case.

6. Both decisions have held the limitation prescribed under Section 11 B of the said Act to be not applicable to refund claims for service tax paid under a mistake of law. The decision of the Supreme Court in the case of ***Collector of C.E., Chandigarh Vs. Doaba Co-Operative Sugar Mills (Supra)*** relied upon by the Appellate Tribunal has in applying Section 11 B, limitation made an exception in case of refund claims where the payment of duty was under a mistake of law. We are of the view that the impugned order is erroneous in that it applies the limitation prescribed under Section 11 B of the Act to the present case where admittedly Appellant had paid a service tax on Commercial or Industrial Construction

Service even though such service is not leviable to service tax. We are of the view that the decisions relied upon by the Appellate Tribunal do not support the case of the Respondent in rejecting the refund claim on the ground that it was barred by limitation. We are, therefore, of the view that the impugned order is unsustainable.

7. We accordingly allow the present Appeals and quash and set aside the impugned order, in so far as it is against the Appellant in both Appeals. We fully allow refund of Rs.8,99,962/- preferred by the Appellant. We direct that the Respondent shall refund the amount of Rs.8,99,962/- to the Appellant within a period of three months. There shall be no order as to costs.

(RIYAZ I. CHAGLA J.)

(A.S. OKA, J.)