IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CENTRAL EXCISE APPEAL NO.06 OF 2019

Kolland Developers Pvt. Ltd.
A Company incorporated under the
Companies Act, 1956, having its
70, Nagindas Master Road, Fort,
Mumbai, Mumbai City MH 400 023 IN. … Appellant

-vs-

The Commissioner of Central Excise
and Customs (Appeals), Nagpur, having
his office at 2nd Floor, Room No.221,
Civil Lines, Telangkhedi Road,
Nagpur 440 001 .. Respondent

Shri Jas Sanghvi, Advocate with Shri R. Tajne, Advocate for appellant.
Shri S. N. Bhattad, Advocate for respondent.

CORAM : A. S. CHANDURKAR AND G. A. SANAP, JJ.
DATE : November 15, 2021

Judgment : (A. S. Chandurkar, J.)

Admit on the following substantial question of law :

" Whether the Customs, Central Excise and Service Tax Appellate Tribunal ought to have followed its own decision in Mahindra Engineering Services Ltd. vs. Commissioner of Central Excise, Pune-I 2015 (38) STR 841 (Tri-Mumbai) especially when the same was after considering the effect of Notification No.9/2009 which now has been superceded by Notification No.12/2013 which is applicable in the facts of the present case ?"

Heard learned counsel for the parties.

2. The facts giving rise to this appeal under Section 35G of the Central Excise Act, 1944 (for short, the said Act) are that the appellant is a Company incorporated under the Companies Act, 1956. It is authorised to develop Information Technology and related services at the Special Economic Zone at MIHAN, Nagpur under the Special Economic Zone Act, 2005. For the purposes of development of the aforesaid services the appellant appointed M/s Shapoorji Pallonji & Co. Pvt. Ltd. as its contractor and sought various services from it. These services were classified under the category of Business Auxiliary Services. After the services provided from the period April 2009 to September 2010 the said service provider raised four debit notes for an amount of Rs.16,19,707/- towards service tax. The appellant with a view to seek refund of the service tax applied to the competent approving authority on 14/07/2010 and sought necessary approval in terms of Notification No.9/2009. The Approval Committee on 27/08/2010 granted necessary approval as sought by the appellant. Notification No.09/2009 was thereafter superceded by Notification No.17/2011 and thereafter by Notification No.12/2013. On 18/09/2013 the appellant paid the service provider the amount of Rs.16,19,707/- and thereafter on 29/09/2014 the appellant filed a refund claim in terms of Notification No.12/2013. On 10/02/2015 a show cause notice was issued to the appellant calling upon it to show cause as to why the refund claimed for an amount of Rs.11,86,949/- should not be rejected under Section 11B(1) of the said Act. The appellant

replied to the same on 27/02/2015 and justified its entitlement to such refund. The Assistant Commissioner on 24/03/2015 rejected the claim for refund that was admissible for the period from April 2009 to September 2010 for an amount of Rs.11,86,949. He however allowed the refund for the amount of Rs.4,32,757/- and Rs.49,440/- for the services rendered after the grant of approval. The appellant preferred an appeal and the Commissioner (Appeal) dismissed the said appeal on 27/11/2015. The appellant then approached the Appellate Tribunal which by the order dated 10/06/2016 dismissed the same by holding that the appellant had not got the services in question duly approved by the Approval Committee and hence it was not entitled for the claim for refund under Notification No.12/2013. This order is the subject matter of challenge in the present appeal.

3. Shri J. Sanghvi, learned counsel for the appellant interalia submitted that the Tribunal was bound by its earlier order dated 10/10/2014 reported in ***2015 (38) S.T.R. 841*** in the case of ***Mahindra Engineering Services Ltd. vs. Commissioner of C. Ex. Pune-I.*** According to him the facts of that decision indicated that the Tribunal had noted that Notification No.09/2009 did not require the requisite services to be approved by the Approval Committee before providing the same. The appellant therein had filed a refund claim after the approval was granted and this fact was similar to the facts in the present case. The Tribunal however disregarded that decision by

observing that the Revenue in that case had not argued that the conditions of Notification No.9/2009 were required to be fulfilled at the time of availing exemption. He submitted that in the light of its own decision in ***Mahindra Engineering Services Ltd.*** (supra) the learned Member either ought to have followed the same or if he was not inclined to do so, the question should have been referred to a larger bench as held by the Division Bench of this Court in ***Mercedes Benz India Pvt. Ltd. vs. Union of India 2010 (252) E.L.T. 168 (Bom.).*** It was not permissible for the Tribunal to have disregarded its own order passed earlier. He then submitted that even on a plain reading of Notification No.12/2013 there was no requirement of obtaining prior approval of the Approval Committee before availing the services as per Condition 3(1). The respondent No.1 therefore erred in not granting the benefit of Notification No.12/2013 as sought by the appellant.

4. Shri S. N. Bhattad, learned counsel for the respondent supported the impugned order. According to him the Tribunal was justified in holding that the conditions requisite for claiming the benefit under Notification No.12/2013 had not been fulfilled by the appellant. Since Notification No.12/2013 was an exemption Notification, the Tribunal rightly held that all necessary conditions were required to be fulfilled for claiming benefit. He referred to the stand taken in that regard in the submissions filed to the present appeal and submitted that the appeal ought to be dismissed. He

relied upon the decisions in ***U.O.I. vs. Ganesh Metal Processors Inds. 2003(151) E.L.T. 21*** and ***Commissioner of Customs (Preventive), Mumbai vs. M/s M. Ambalal and Co. 2010 (260) E.L.T. 487*** in support of his contention.

5. On hearing the learned counsel for the parties and after giving due consideration to their respective submissions we are of the view that the learned Member of the Tribunal was not justified in distinguishing the earlier decision of the Tribunal rendered in the case of ***Mahindra Engineering Services Ltd.*** (supra) on the ground that the argument that all conditions of the said Notification had to be fulfilled while availing the exemption in question. The Tribunal in ***Mahindra Engineering Services Ltd.*** (supra) while considering the effect of Notification No.09/2009 had in paragraph 6 of its order held that said Notification did not require the approval from the Approval Committee to be obtained prior to providing the services in question. It also noted that the refund claimed therein had been filed after approval was granted by the Approval Committee. This was held to be sufficient compliance with the requirements of Notification No.09/2009. The appellant before the Tribunal had also raised a contention that the conditions of Notification No.09/2009 were similar to the conditions in Notification No.12/2013. We find that the impugned order of the Tribunal does not consider the latter contention raised by the appellant for if that contention were to be accepted by the Tribunal, it either ought to have followed its earlier view in ***Mahindra Engineering Services***

Ltd. (supra) or if it was not inclined to do so, it ought to have referred the question to a larger bench as held in ***Mercedes Benz (India) Pvt. Ltd.*** (supra). Even otherwise we find that merely because a particular argument was not raised when the earlier proceedings were decided would not be a sufficient ground to disregard an earlier adjudication made on merits. It would be open for the Tribunal in subsequent proceedings to doubt the correctness of the view earlier taken and refer the question to a larger bench but it would not be permissible to disregard the earlier view on the ground that a particular contention was not raised when the earlier order was passed.

6. Since we prima facie find that the appellant was justified in relying upon the earlier decision of the Tribunal in ***Mahindra Engineering Services Ltd.*** (supra) and that the Tribunal was not justified in disregarding its earlier order, we find that re-consideration of the proceedings by the Tribunal is warranted in this backdrop. Accordingly the substantial question of law as framed is answered by holding that the Customs, Central Excise and Service Tax Appellate Tribunal ought to have considered the effect of its earlier decision in ***Mahindra Engineering Services Ltd.*** (supra). If it was of the opinion that said view required re-consideration, the option of referring that question to a larger bench ought to have been exercised. In view of the aforesaid answer the following order is passed :

i) The order dated 10/06/2016 passed by the Customs, Excise and

Service Tax Appellate Tribunal, Mumbai in Appeal No.ST/85448/16 is set aside.

dfii) The proceedings are remanded to the Tribunal to decide the appeal afresh on its own merits and in accordance with law. Since the proceedings pertain to the year 2016, the Tribunal is requested to decide the same expeditiously within a period of four months from the production of a copy of this order.

iii) Central Excise Appeal No.06/2019 is allowed in aforesaid terms leaving the parties to bear their own costs.

JUDGE **JUDGE**

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