CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO.4

SERVICE TAX APPEAL NO. 85860 OF 2020

(Arising out of Order-In-Appeal No.NA/GST/A-III/MUM/273-275/2019-20 Dated 11.03.2020 passed by the Commissioner (Appeals-III) Mumbai)

KANAKIA SPACES REALITY PVT. LTD. .....Appellant
(215, Atrium Mall, 10th Floor,
CTC, Andheri-Kurla Road,
Andheri (E), Mumbai-400093.)

VERSUS

COMMISSIONER OF CGST & CENTRAL EXCISE, MUMBAI ....Respondent
(9th Floor, Lotus, Parel,
Lotus Infocentre, Near Parel Station,
Parel (E), Mumbai-400012)

WITH

SERVICE TAX APPEAL NO. 85861 OF 2020

(Arising out of Order-In-Appeal No. NA/GST/A-III/MUM/273-275/2019-20 Dated 11.03.2020 passed by the Commissioner (Appeals-III), Mumbai.)

KANAKIA SPACES REALITY PVT. LTD. .....Appellant
(215, Atrium Mall, 10th Floor,
CTC, Andheri-Kurla Road,
Andheri (E), Mumbai-400093.)

VERSUS

COMMISSIONER OF CGST & CENTRAL EXCISE, MUMBAI ....Respondent
(9th Floor, Lotus, Parel,
Lotus Infocentre, Near Parel Station,
Parel (E), Mumbai-400012)

AND

SERVICE TAX APPEAL NO. 85862 OF 2020

(Arising out of Order-In-Appeal No. NA/GST/A-III/MUM/273-275/2019-20 Dated 11.03.2020 passed by the Commissioner (Appeals-III), Mumbai.)

KANAKIA SPACES REALITY PVT. LTD. .....Appellant

(215, Atrium Mall, 10th Floor,
CTC, Andheri-Kurla Road,
Andheri (E), Mumbai-400093.)

VERSUS

COMMISSIONER OF CGST & CENTRAL EXCISE, MUMBAI
....Respondent

(9th Floor, Lotus, Parel,
Lotus Infocentre, Near Parel Station,
Parel (E), Mumbai-400012)

Appearance:

Shri Mayur Jain, Advocate with Ms.Rinki Arora, Advocate for the Appellant.

Shri S.B.P. Sinha, Authorized Representative for the Respondent.

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

FINAL ORDER NO. 85349-85351/2024

DATE OF HEARING : 22.12.2023
DATE OF DECISION : 14.03.2024

P.K. CHOUDHARY:

All these 03 (three) appeals have been filed assailing a common order impugned before me being Order-In-Appeal No. NA/GST/A-III/MUM/273-275/2019-20 Dated 11.03.2020 passed by the Commissioner (Appeals-III), GST & CX, Mumbai. Hence, all the three appeals are taken up together for hearing and disposal.

2. Facts of the case in brief are that the Appellant is in the business of providing construction of residential complex service. The Appellant have received booking in respect of the apartments being constructed by it. The Appellant had accordingly collected the booking amount and had discharged the applicable Service Tax in respect of such booking amount so collected. Subsequently, due to various reasons, 29 allottees decided to cancel their respective bookings with the Appellant. Accordingly, the Appellant refunded the advance

amount/booking amount so paid by such allottees alongwith the service tax amount collected and deposited by the Appellant with the Revenue. Details of which are mentioned below:-

Refund filed on 06.03.2018

Date of cancellation	Name of the customer	Name of the project	Unit No.	Original Refund
01-11-2017	Bhupendra S. Danu	Levels	B - 3403	5,01,192
10-11-2017	Krunal Mahendra Gandhi	Levels	C-903	1,12,500
21-12-2017	Arpit Khaitan	Levels	C - 2601	22,500
16-10-2017	Nirmala Rose James Chettiar	Rainforest	D - 1203	9,000
16-10-2017	Jahida Abdulsamad Pathan	Rainforest	C - 1303	4,57,902
06-12-2017	Elsy Francis Nadar	Zenworld	B - 701	9,000
06-12-2017	Elsy Francis Nadar	Zenworld	B - 702	9,000
02-02-2018	Prathamesh Raorane	Zenworld	E - 402	69,734
26-02-2018	Mr. Tushar Vasant Pawar	Zenworld	B - 901	1,135
19-12-2017	Chandrakant Mohanlal Doshi	Sevens	G - 1503	2,17,157
23-12-2017	Vivek Bhutta	Sevens	C - 1705	45,000
Total				**14,54,120**

ii. Refund claim filed on 27.04.2018

Date of cancellation	Name of the customer	Name of the project	Unit No.	Original Refund
25-10-2017	Sukesh Goyal HUF	Wallstreet	B-914	1,72,314
17-11-2017	Mamta Mittal	Wallstreet	B-312	70,470
28-11-2017	Sanjay Kheta	Wallstreet	B-313	1,43,802
10-03-2018	Kailash Chandra Agarwal	Wallstreet	B-702	2,31,226
10-03-2018	Kailash Chandra Agarwal	Wallstreet	B-702	1,29,865
Total				**7,47,677**

Date of cancellation	Name of the customer	Name of the project	Unit No.	Original Refund
23-06-2017	Snehaben Dineshkumar Patel	Rainforest	H - 1303	1,34,865
09-06-2017	Amit Brijvansh Singh	Rainforest	A 301	73,156
15-06-2017	K Wing - Farhan Tambe	Zenworld	A 701	48,432
Total				**2,56,453**

Sr. No.	Refund Claim filed on	Original Claim Amount	Revised Claim Amount
1	Refund claim filed on 06.03.2018	23,98,303	14,54,120
2	Refund claim filed on 27.04.2018	7,47,677	7,47,677
3	Refund claim filed on 29.06.2018	3,68,617	2,56,453
Total		**35,14,597**	**24,58,250**

3. Pursuant to the refund applications filed by the Appellant, it was issued deficiency memo cum Show Cause Notice proposing rejection of refund claims on various grounds such as

absence of documents, substantiating the proof of payment of tax, copy of agreement entered into with the customers, details of booking and subsequent cancellation by the customers, proof of remittance of service tax to the customers. Subsequently, by a consolidated adjudication order, the refund claims were rejected. Being aggrieved by the same the Appellant filed appeals before the learned Commissioner (Appeals) which came to be rejected vide the common order impugned before me. Hence, the present appeals before the Tribunal.

4. The learned Advocate appearing on behalf of the Appellant has made the following submissions;

(a) That the impugned order has erred in recording in para 10.3 that, the case laws and circulars relied upon by the Appellant pertains to the issue originating prior to the introduction of the negative list, and therefore, the same are not applicable to this case.

(b) That interpretation of the Department that services were already provided at material time and at the time of cancellation of flat, it cannot be considered as "services were not provided" or "partially not provided" is absolutely baseless. If this was the intention of the lawmaker, then option of adjustment of Rule 6(3) under earlier regime would not have been provided in the legislature.

(c) That Section 67 of the Finance Act which governs the valuation of taxable services for charging/levy of tax emphasises that only the gross amount 'charged' by the service provider shall be liable to service tax. Therefore, where the amount has been refunded back to the customers, then it can be construed that no amount is charged by the service provider and no tax is leviable on the same. The statutory provision itself does not accommodate any service tax payment on any amount which is effectively not collected by the service provider.

5. The Ld. Authorised Representative for the Revenue has reiterated the findings of the Ld. Commissioner (Appeals) and the Adjudicating authority.

6. Heard both sides and perused the appeal records.

7. 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?

8. Before I proceed to examine the issues enumerated above, I find that when these matters had come up for hearing, 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.

9. 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.*
>
> *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.

10. 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.

11. 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]

12. 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.

13. I find that it is the case of the Appellant that the cancellation of agreements for purchase of the Apartments 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 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.

17. 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 appeals are accordingly allowed with consequential relief, as per law.

(Pronounced in open court on 14.03.2024)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

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