CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Service Tax Appeal No. 88931 of 2018

(Arising out of Order-in-Appeal No. NSK/135/RGD/2018 dated 08.05.2018 passed by the Commissioner of Central GST, Raigad

Commissioner of CGST, Mumbai **…..Appellant**
9th Floor, Lotus Info Centre,
Parel (East),
Mumbai

Vs.

Bharat Mumbai Container Terminals P. Ltd. **…..Respondent**
Windsor Unit No. 604, CST Road,
Vidyanagari Marg,
Kalina,

APPEARANCE:

Shri M. Suresh, Jt. Commissioner (AR) for the appellant
Shri Sunil Gabhawalla, CA for the respondent

CORAM: **Hon'ble Mr C J Mathew, Member (Technical)**
Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

FINAL ORDER No: A/86588/2019

DATE OF HEARING : 03.09.2019
DATE OF DECISION : 03.09.2019

PER: C J MATHEW

This appeal of Revenue lies against order-in-appeal no. NSK/135/RGD/2018 dated 8th May 2018 of Commissioner of Central GST, Raigad and disputes the refund of ₹48,61,75,921/- sanctioned to the respondent, M/s Bharat Mumbai Container Terminals P. Ltd, on

the determination that they were entitled to the consequences of retrospective exemption accorded to the activity rendered in a works contract awarded by Jawaharlal Nehru Port Trust.

2. The tax liability, discharged for the period 1st May 2015 to 29th February 2016, as provider of 'works contract service' on which the exclusion, pertaining, *inter alia*, to ports, effected by notification no.25/2012-ST dated 20th June 2012, arose from its withdrawal by notification no. 6/2015-ST dated 1st March 2015 to be restored later by notification no. 9/2016-ST dated 1st March 2016. By incorporation of section 103 through Finance Act, 2003, the exemption, withheld for the *inter regnum*, was made applicable with retrospective effect.

3. Respondent herein filed on 30th August 2016, its claim for refund of tax included the dues of ₹43,16,39,802/- payable to M/s. Afcons Infrastructure Ltd and of ₹5,45,36,119/- to M/s ITD Cementation India Ltd. In effect, though the tax liability had been discharged by these two sub-contractors and the recipient of the service was the contractor of Jawaharlal Nehru Port Trust charged with execution of the project, eligibility for the claim was sought as 'person' who had borne the incidence of tax.

4. The original authority, and the first appellate authority, examined the eligibility for application of retrospective exemption and held that the claim had been filed within the time prescribed in section

103 of Finance Act, 1994. The scope for 'unjust enrichment' was also examined and it was found that the bar did not arise.

5. We have heard the submissions of Learned Authorised Representative and Learned Chartered Accountant appearing for the respondent. It would appear that the grievance of Revenue is that the appellate authority, while upholding the refund, failed to examine the existence of claim, if any, filed, or benefit availed, by the two sub-contractors consequent upon restoration of exemption. It was also contended that, despite the assertion made to the contrary in response to proposal for rejecting the claim, the cost of the project had been capitalised/amortised. Furthermore, it is alleged that first appellate authority had failed to ascertain if the respondent had concurred with Jawaharlal Nehru Port Trust to include the tax component in the capitalisation to avail higher depreciation. It is also contended that the requirement, in notification no. 9/2016-ST dated 1st March 2016, prescribing certification of the contract having been entered into before 1st March 2015 had not been complied with.

6. Learned Authorised Representative contends that the decision of Hon'ble Supreme Court in *Commissioner of Customs v. Presto Industries [2001 (128) ELT 321 (SC)]* and that of the Tribunal in *Mars Plastics & Polymers Pvt Ltd v. Commissioner of Customs, Chennai [2003 (156) ELT 941 (Tri-Mumbai)]* required the applicant

of refund to establish their eligibility for benefit of any exemption notification.

7. Having considered the rival submissions, we are of the opinion that the impugned order cannot be assailed for non-compliance with the certification prescribed in the exemption notification as the certificate furnished, though issued on the letterhead of the Port Trust, has been attested by the Deputy Secretary in the Ministry of Shipping, Government of India. The exemption notification has not prescribed the form or manner in which the certificate of the Ministry is to be authenticated. Attestation of the certificate signed by Chairman, Jawaharlal Nehru Port Trust by the competent authority in the Ministry of Shipping, therefore, suffices as compliance.

8. The issue of whether any claim for refund has been preferred by the two sub-contractors who included the tax in the invoice raised on the respondent herein or had availed benefits is, in our opinion, too vague on allegation to be raised at this juncture. There is no essaying of any facts, or even speculation, on the nature, and extent, of benefits that could be availed. The Tribunal is not to be expected to either undertake an enquiry, or direct any of the lower authorities to proceed in that direction merely on the basis of apprehensions entertained by the Committee of Commissioners.

9. Appropriately, a responsible approach on the part of the Committee would have been to enunciate some facts that could

reasonably lead to such conclusion. In the absence thereof, this ground is not tenable. In fact, the apprehension that appears to have led by the Committee on that path is apparent from reference to the amount involved in the refund, superfluous though it be. The withdrawal of the exemption for a limited period was considered to be crucial enough for reconsideration and it is with full authority of Parliament that the exemption was not only restored but refund of amount already paid legislated upon. Notwithstanding this enactment by this supreme legislative organ of the State, innate caution of the executive appears to have asserted itself.

10. The appellant appears to be apprehensive that the accounting treatment of the tax, under claim for refund, and the consequence of capitalisation of this amount would enable availment of benefit of depreciation which would be passed on as cost to customers. It has been brought to our notice by Learned Chartered Accountant that the response to the objection on the claim for refund is not necessarily a correct or proper reflection of the treatment accorded by the respondent. It was submitted that there has been no amortisation, or capitalisation, of the said amount and, on the contrary, as held by the first appellate authority, the refund amount is reflected in the books of accounts as ‘dues from the government of service tax refund receivable’ within the category of ‘Advance- Capital Creditors’. It was also clarified that the suggested accountal is nothing but a statement of intent of amortisation upon commencement of

commercial operation. Commencement of commercial operation took place only in March 2018 and, hence, in view of the refund claim having been filed, the amortisation had not been taken place. Therefore the apprehension of amortisation, or any other downstream benefit of capitalisation, will not arise.

11. Furthermore, it must be noted that under the scheme of operation of major ports, it is the Tariff Authority on Major Ports (TAMP) which determines that actual rates chargeable from customers and, in the computation of such chargeable amount, adequate safeguards exist for excluding amount that are not costs; the charges are invariably computed on 'cost plus' and hence the inclusion of the amount under the relevant head of expenses. In view of our above finding on the absence of tenability of the grounds of appeal and the clear finding of having borne the incidence of tax, we find no reason to interfere with the orders of lower authorities. Accordingly, appeal is dismissed.

(Operative part pronounced in Court)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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