

पुस्तक संख्या
दिनांक
पुस्तक संख्या

अद्यतन अधिनियम नं. २१९, २००६ का अन्तर्गत जमानत भूतक

आर. नं. १०८/२००६-२००७ (अ. नं. १०८/२००६-०७)

सुनियोजित, को. प्रशा. वि. नं. १०८/२००६-०७ अ. नं. १०८/२००६-०७

सं. नं. १०८/२००६-०७ (अ. नं. १०८/२००६-०७)

अनुसूची सं. १०८/२००६-०७

पुस्तक सं. १०८-२००६/२००७ (अ. नं. १०८/२००६-०७)



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अधिकारिता के अधीन में प्रेषित

B.N.V.-K.M.C. 18-49-1-A.P.A.-116-2618-119

अधिकारिता के अधीन में प्रेषित	०२.०६.२०१६	पुस्तक सं. १०८/२००६-०७	०२.०६.२०१६
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Prepared by Jitin Kumar Sachdeva, Deputy Registrar (B.N.V.) B.N.V.

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:: ORDER IN APPEAL ::

M/s. Madhu Sisco Pvt. Ltd., DL-IV Dist No. 149 Vardol, Bhavnagar (hereinafter referred to as 'Appellant') filed appeal against Order-in-Original No. R-16/2017 dated 10.03.2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Service Tax Division, Bhavnagar (hereinafter referred to as 'the lower adjudicating authority').

2. The brief facts of the case are that the Appellant files refund claim of Rs. 33,551/- on 12.02.2017 which was paid by them on confirmation of Order-in-Original No. 29/AC/STAX/DIV/2016-17 dated 01.02.2016 on the issue of Sponsorship service and payment of Service Tax by Service Receiver on Reverse Charge basis. Subsequently, the Appellant realized that they were not required to pay Service Tax as per the decision of the Hon'ble GSTAT in the case of M/s. Hero Motors Ltd. reported as 2013(32)STC371 (T-08) and therefore they filed refund claim.

2.1. The lower adjudicating authority vide the impugned order rejected the refund claim holding that Order-in-Original No. 29/AC/STAX/DIV/2016-17 dated 01.12.2016 had decided the issue and the order attained finality as no appeal was filed by the appellant against the said Order-in-Original dated 01.12.2016.

3. Aggrieved with the impugned order, the appellant preferred present appeal and contended that the refund is payable as per Section 113 of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') and Section 86 of the Finance Act, 1994, since tax was paid by them erroneously he can claim refund.

4. Personal hearing in the matter was attended to by Shri R. R. Dave, Consultant wherein he reiterated the grounds of appeal and submitted written submissions with request to allow appeal following case law of M/s. Hero Motors Ltd. as stated by them in Appeal Memorandum. No one appeared from the Department despite personal hearing notice was issued to the Commissionerate.

4.1. In written Plea submitted by the appellant submitted that non filing of appeal against any Order of adjudicating authority would not take away their right of getting refund and the impugned order is required to be set aside.

ELUCIDATING:

6. I have carefully gone through the facts of the case, the impugned order, the grounds of appeal, written and oral submissions made by the Appellant. The issue to be decided in the instant appeal is whether the impugned order rejecting refund claim on the ground of non preferring of appeal against the Order-in-Original passed by the adjudicating authority confirming the demand (having attained finality) is correct or not.

6. I find the Order-in-Original No. 3413/2017 dated 19.08.2017 was passed by the then lower adjudicating authority whereby demand of Rs. 53,561/- was confirmed vide Order-in-Original dated 01.12.2016 and was paid by the taxpayer along with interest and penalty. The Order-in-Original dated 01.12.2016 was not challenged by the Appellant and thus has attained finality.

7. Subsequently it came upon the Appellant, after the decision of the Hon'ble CESTAT in the case of M/s. Hero MotoCorp Ltd reported as 2013(12)STR01171 (Del) that they were not required to pay service tax, which they had paid in pursuance of the Order-in-Original dated 01.12.2016. The appellant then filed refund claim on 04.01.2017 which was rejected by the lower adjudicating authority and the impugned order dated 19.08.2017.

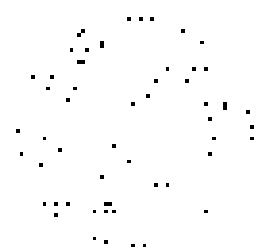
8.1 Para 12 and 13 of the impugned order are reproduced for better appreciation of facts of this case.

12. I find that the claimant also have not preferred any appeal against the Order-in-Original in 30/05/2017 dated 01.12.2016. Further, the basis of refund claim is not clear because there is no order or any appellate authority or otherwise to direct to reconsider the case already decided by the original adjudicating authority. The refund claim was allowed finally as the same was also being accepted by the department. I find that merely filing a refund claim by returning a refund claim is not correct procedure and can't be accepted by the department and refund cannot be granted on such grounds.

Therefore, I find that the present refund claim seems inadmissible as this issue has already decided this case and there is no any further direction from the Appellate Authority as the claimant was not filed appeal against the OIO.

13. I find that the claimant has made written submission to the CIT held on 05.05.2017 that they had not preferred an appeal against the aforesaid OIO. Therefore, it is clear that the claimant has also accepted the original OIO.

[Emphasis supplied]



6 The appellant has contended that payment of Service Tax, interest and penalty in accordance of Order-in-Original dated 01.12.2013 was a mistake on their part and hence, this amount (Rs. 33,24,174) should be refunded to them. I find that it is well settled law that once any order is accepted and appeal is not preferred against that order, the proceedings attain finality and it can't be reopened after appeal period is over without going in Appeal and obtaining order from higher appellate authority/court. The Hon'ble Supreme Court in the case of M/s. Hoke (India) Pvt Ltd reported as 2000 (2) ELT 285 (SC) has settled the matter as under :-

"10. Coming to the question that is raised there is little scope for doubt that in a case where an administrative authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the administrative authority subsequently by filing a writ for refund on the ground that the administrative authority had committed an error in passing his order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position in our view, will be contrary to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot be countenanced. The view taken by us also gets support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer, may refund, the amount in such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act (therefore, an order which is appealable under the Act is not challenged that the order is not valid to be questioned and the matter is not to be reopened in a proceeding for refund which if we may term it so is by the nature of conduct of a decreeholder, in the case of how it was specifically mentioned in the order of the Assistant Collector that the assessee may not appeal against the order before the Collector (Appeal if so desired)".

[Emphasis supplied]

9.1 I also rely upon a dictum of the Hon'ble CESTAT in the case of M/s. Vidroon Kamarda Glass reported as 2009 (204) LLJ 311 (Chennai) wherein it is held as under :-

"It is seen that subsequently the Hon'ble Supreme Court in case of CCE, Hyderabad v. Associated General Companies Ltd. 2002 (157) ELT 12 (SC) held that the credit availed on MSD oil is eligible for credit up to 1.5% accordingly, the appellant filed a fresh claim for refund of duty. The same was rejected by the authorities before us against the order under the Act. Circumstances related and refund claim was not appealed against and has attained finality and it was not open to the appellant to claim the refund claim for the same duty with on the same ground."

For better appreciation, we reproduce the relevant paragraphs of the Commissioner's (Appeals) order

"In the case, it was admitted fact that the Asst. Commissioner of C. Ex. & Customs, Meerapur was notified on 07/04/2005, dt. 10/1/00 disallowed the Minor order number of HCE dt. during the period June 97 to Jan 98 and also that the duty debited under protest by the appellants was for the tax and interest the refund claim of Rs. 12,32,547. It is also an admitted fact that the appellants have not filed any appeal against the said order dt. 12-1-00. It is also admitted fact that subsequent to the revision of Article 226(b) of the Constitution of India by the Supreme Court dt. 13/11/2002, the appellants have fresh revised application covering period from June 97 to Jan 98.

In this context, I find that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority. Subsequently, by filing a claim for refund on the ground that the Hon'ble Supreme Court has held that such a refund is admissible on merit for the period prior to 13/11/02. If this ground is accepted, then the provisions for equitance in the Act and Rules, the provisions for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant.

4. It is not the appellants case that the order passed by the Asst. Commissioner of 12-1-00 was appealed against. As such, the lower authorities have correctly held that the refund claim cannot be filed for the period from when the order order has become final."

[Enclosure supplied]

3. In view of above 1 and that the refund claim of the appellant is not maintainable and has been correctly rejected by the lower adjudicating authority, I, therefore, uphold the impugned order and reject the appeal.

इति आदेश। दस्तावेजों के साथ प्रतीक नमूने में प्रस्तुत तरीके से किया जाता है।

5.1 The appeal filed by the appellant is disposed off in above terms.

आदेश देता हूँ
[Signature]
आ. कु. के. वि.
07/04/2005

[Signature]
[कुमार संतोष]
अध्यक्ष (अपील)

By R.H.A.D.

In

Mrs. Madhu Sibia Patel, Is.
DU-IV,
File No. 147,
Vardol,
Bharwadgaon - 354 061

श्रीमती मधु सिनियर लखंडे
दि.
DU-IV, फाइल नं. 147,
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Copy for information and necessary action to :-

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information.
2. The Commissioner, GST & Central Excise Bhavnagar Commissionerate Bhavnagar
3. The Additional Commissioner, GST & Central Excise Division Bhavnagar
4. The Assistant Commissioner, Service Tax Division, Bhavnagar.
5. Guard File