CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 61853 of 2018

[Arising out of Order-in-Appeal No. 74-ST-CG-ST-APPEAL-GURUGRAM-SG-2017 dated 29.06.2018 passed by the Commissioner (Appeals), of Gurgaon]

Commissioenr of Central Excise and ST, Gurgaon I ……**Appellant**
(Plot No. 36 & 37, Sector 32, Near Medanta Hospital, Gurgaon 122001, Haryana)

VERSUS

Ms C B R E South Asia Pvt Ltd ……**Respondent**
(19th Floor, DLF, Square M Block Jacaranda Marg, DLF City Phase-ii, Gurugram 122002, Haryana)

APPEARANCE:

Present for the Appellant: Shri Aneesh Dewan, Advocate

Present for the Respondent: Shri Priyamwada Sinha, Authorized Representative

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 60524/2024

DATE OF HEARING: 15.05.2024
DATE OF DECISION: 13. 09.2024

PER S. S. GARG

The present appeal filed by the Revenue is directed against the impugned order dated 29.06.2018 whereby the Commissioner (Appeals) has allowed the refund of Rs. 2,53,31,030/- along with interest on delayed payment of refund under Section 11BB of Central Excise Act, 1944.

2. Briefly the facts of the present case are that the respondent is engaged in providing services of real estate agent services, maintenance and repair and consulting engineering services. The respondent provides services to various clients located in Domestic Tariff Area ('DTA') as well as in Special Economic Zones ('SEZ'). In respect of the services rendered to clients located in DTA, the Respondent duly discharged service tax liability after availing the credit of input services in terms of CCR Rules. However, with respect to the services rendered to SEZ Unit, the Respondent claimed the exemption from the payment of service tax.

2.2 Since, the respondent was availing the CENVAT credit on the input services without maintaining separate accounts for taxable and exempted services. Accordingly, considering the services rendered to SEZ Unit as exempted, the Respondent paid an amount of Rs. 2,52,31,030 on the amount received against the services provided to SEZ Units for the period October 2011 to March 2012 ('Disputed Period'), in compliance of the Rule 6(3)(i) of the CCR Rule 2004. The respondent has also showed the reversal of the said amount of Rs. 2,52,31,030/- in the service tax returns produced on record. Subsequently, the respondent came to know that in terms of Rule 6(6A) of the CCR Rules, Rule 6(3) of CCR Rules is not applicable in case the taxable services are provided to SEZ Unit without payment of service tax. Thereafter, the respondent filed a refund application of Rs. 2,52,31,030 on 26 March 2013 claiming that the amount was paid inadvertently and erroneously during the disputed period.

2.3 After the lapse of almost 4 years, the department issued a 'Deficiency Memo' dated 24 January 2017 and proposed to reject the refund claim. The Respondent filed the reply against the 'Deficiency Memo' on 02 February 2017; thereafter, the refund claim was rejected by the adjudicating authority vide the Order-in-Original dated 09.01.2018 on the following grounds:

- *The amount paid by the Respondent was paid from the CENVAT Credit and not in cash by challans as claimed by the Respondent.*
- *The Respondent had paid the amount under Rule 6(3) of CCR Rules whereas they were not liable to pay in terms of Rule of 6(6) of CCR Rules. They must have recovered the same from their clients to the extent they had deposited the amount under Rule 6(3) of CCR Rules for the services provided to SEZ Unit.*
- *The Respondent has debited the amount of CENVAT Credit inadvertently colouring the same as payment of 6% of the value exempted services under Rule 6(3) of the CCR Rules. Thus, the refund of deposit of the amount of Rs. 2,52,31,030 made by the party colouring the same as an amount paid under Rule 6(3) of CCR is covered under Section 11B of the Central Excise Act, 1944 ('CE Act').*

- *If the refund is sanctioned then the same would amount to unjust enrichment to the Respondent which is in violation of Section 11B(1) of the CE Act.*

2.4 Aggrieved by the Order-in-Original appeal was filed and the Commissioner (Appeal) vide the Order-in-Appeal dated 29.06.2018 allowed the appeal in favour of the respondent and set aside the Order-in-Original. Aggrieved by the said order, Revenue has filed the present appeal.

3. Heard both the parties and perused the material on record.

4. Ld. AR appearing for the Revenue filed the written submissions which are taken on record. He further submitted that the refund has rightly been rejected by the adjudicating authority because the amount paid for the service provided to SEZ unit was paid from Cenvat Credit and not in cash as claimed by the respondent. He further submits that the respondent must have taken into account this cost into the value of the services provided to SEZ units and passed on the same to them and the refund of such amount shall amount to unjust enrichment.

4. 2 He further submits that the refund of deposit sought by the respondent is covered under Section 11B of the Central Excise Act, 1944 as made applicable to the service tax matters.

5. On the other hand, Ld. Counsel appearing for the respondent supported the impugned order and submits that it is undisputed that the respondent has paid the amount of Rs.

2,52,31,030/- towards Cenvat credit under Rule 6(3) of CCR Rules inadvertently as reflected in the revised ST-3 returns for the period October, 2011 to March, 2012. He further submits that the objection of the Department that the payment was made from Cenvat credit and not via cash challans is immaterial for the purpose of refund claim. He further submits that denial of the refund claim would be against the constitutional provision under article 265 of the Indian Constitution. In support of his submissions, he relied upon the various decisions:

- *3e infotech Vs. CESTAT (Madras HC) 2018[18] G.S.T.L. 410*
- *Abdul Samad Vs. Commissioner of CCE & ST, Mangaluru (Karnataka High Court) 2019 (367) E.L.T. 189 (Kar.)*
- *Hindustan Cocoa Products Vs. Union of India (Bombay High Court) 1994 (74) E.L.T. 525 (Bom.)*
- *Hitachi Metals Vs. CCE ST Gurgaon (CESTAT Chandigarh) 2019 (25) G.S.T.L. 573 (Tri.-Chan.)*
- *Comm of C. Excise (Appeals) Bangalore) Vs. KVR Construction (Karnataka High Court) 2012 (26) S.T.R. 195 (Kar.) upheld by Hon'ble Supreme Court 2018 (14) G.S.T. L. J70 (S.C.)*
- *Monnet International Vs. Commissioner of Central Excise New Delhi (CESTAT New Delhi) 2017 (3) G.S.T.L. 380 (Tri.-Del.).*
- *National Institute of Public Finance and Policy Vs. Commissioner of Service Tax (Delhi HC) 2019 (20) G.S.T.L. 330 (Del.).*

- *Parijat Construction Vs. Commissioner of Central Excise Nasik (Bombay HC) [2018] (359) ELT 113 (Bom).*

- *Oriental Insurance Company Limited Vs. CCE ST, LTU [2020] 75 GSTR 44 (Tri.- Delhi).*

6. As regards the grounds of unjust enrichment, the Ld. Counsel submits that the list of invoices issued to SEZ unit along with sample copies of test invoice issued to SEZ units clearly showing that no service tax was charged from the SEZ unit. Further, the respondent also filed the affidavit of Chartered accountant who has certified that no tax was charged from the SEZ unit. In support of this submission he relied upon the following decisions:

- *ECE Industries Ltd Vs. Commissioner of Service Tax (Appeals-I) Chennai (CESTAT Chennai) 2018 (9) TMI 1139*

- *Commissioner of GST Rohtak Vs. Gawar Construction [P&H, HC) 2020 (373) E.L.T. 298 (P & H HC)*

- *Amrit Learning Vs. Commissioner of Service Tax Delhi (CESTAT Delhi) 2016 (41) S.T.R. 902 (Tri.-Del.)*

- *Kirloskar Ebara Pumps Vs. Comm of Central Excise Kolhapur (CESTAT Mumbai) 2015 (38) S.T.R. 488 (Tri.-Mumbai)*

- *Commissioner of ST Ahmedabad Vs. S Mohanlal Services (CESTAT Ahmedabad) 2010 (18) S.T.R. 173 (Tri.-Ahmd.).*

- *Natraj and Venkat Associates Vs. A.Commissioenr* of ST Chennai (Mad HC) 2010 (249) E.L.T. 337 (Mad.).

7. We have considered the submissions of both the parties and perused the various decisions relied upon by the respondent cited (Supra), it will be appropriate to reproduce the extract of Rule 6(3) of the CCR Rules 2004 prevalent during the disputed period which is reproduced herein below:

> "Rule 6 (3) Notwithstanding anything contained in sub rule (1) and (2) the manufacturer of goods or the provider of output service, opting not to maintain separate accounts shall follow any one of the following options, as applicable to him, namely
>
> (1) pay an amount equal to 5% of value of exempted goods
>
> The relevant extract of Rule 6(6A) which was inserted vide Notification No. 3/2011-CE-NT dated 01.03.2011 is reproduced here in below:
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> "Rule 6(6A) The provisions of sub rule (1), (2), (3) and (4) shall not be applicable in 6(6A) are provided without payment of service tax to a unit na Special Economic Zone for their authorized authorities."

8. Further, we find that the respondent after knowing that they have erroneously paid the service tax, filed the refund claim on 26.03.2013 but the Department raised the Deficiency Memo after almost four years but the respondent replied the deficiency memo and thereafter, the adjudicating authority rejected the refund on the ground of unjust enrichment as well as under Section 11B(1) of the

Central Excise Act, 1944. Further, we find that the Ld. Commissioner (Appeals) after analyzing Rules 6(3) of the CCR Rules and Rule 6(6A) has held that Rule 6(3) does not refer to the duty of excise or service tax. The word used is 'amount' and not 'duty' or tax and further the amount so payable is not available as input tax credit to the recipient and therefore, the amount payable under Rule 6(3) CCR Rules is not "Service tax" payable under Section 66 of the Finance Act and further the Ld. Commissioner has held that the doctrine of unjust enrichment is not applicable in availing the Cenvat Credit or in case of refund of Cenvat credit as mandated under Section 11B(2)(c) of CE Act.

9. Further, we find that the Hon'ble Madras High Court in the case of M/s 3e Infotech cited (Supra) has held in para 13 & 14 as under:

> "13. On an analysis of the precedents cited above, we are of the opinion, that when service tax is paid by mistake a claim for refund cannot be barred by limitation, merely because the period of limitation under Section 11B had expired. Such a position would be contrary to the law laid down by the Hon'ble Apex Court, and therefore we have no hesitation in holding that the claim of the Assessee for a sum of Rs. 4,39,683/- cannot be barred by limitation, and ought to be refunded.
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> 14. There is no doubt in our minds, that if the Revenue is allowed to keep the excess service tax paid, it would not be proper, and against the tenets of Article 265 of the Constitution of India. On the facts and circumstances of this case, we deem it appropriate to pass the following directions:-

a) The Application under Section 11B cannot be rejected on the ground that is barred by limitation, provided for under Section.

b) The claim for return of money must be considered by the authorities."

10. Similarly, Karnataka High Court in the case of Abdul Samad cited Supra has held in para 7 & 8 as under:

"7. The settled principle of law is mere payment of tax made by the respondent under the mistaken notion would neither validate the nature of payment nor the nature of transaction. The controversy in the present case involves around the applicability of Section 11B of the Act to the facts of the present case. In the KVR Construction, supra, the Division Bench of this Court has categorically observed that when once there was no compulsion or duty cast to pay the service tax, the amount paid by petitioner under mistaken notion, would not be a duty or "service tax" payable in law. Once it is not payable in law there was no authority for the department to retain such amount which would otherwise be outside the purview of Section 11B of the Act. To arrive at such a finding reference is made to the judgment of the Hon'ble Apex Court in the case of Mafatlal Industries Limited v. Union of India 1997 (89) E.L.T. 247.

8. The department has rejected the claim only on the ground that the claim was barred by limitation as provided under

Section 11B of the Act. As could be seen, the petitioner has paid tax amount on a mistaken notion and the maintenance of books of MESCOM is not a taxable service, the department cannot get itself unjust enriched by relying on Section 11B of the Act. If the services are not coming within the ambit of taxable service as contemplated under the Act. Section 11B of the Act is not applicable. Hence, respondent No. 2 is directed to refund the tax amount to the petitioner.

11. Further, in the case of Hindustan Cocoa Products cited (Supra), the Bombay High Court has held as under:

"7. We have carefully considered the rival submissions. There is no dispute about the fact that the classification of deodorised cocoa butter by the petitioner under Item 12 was a mistake of law which was discovered neither by the petitioner nor by the respondents till the year 1983. It was only in November 1983, when the petitioner having come to know of the said mistake, filed a revised classification list classifying the above item under Tariff Item 68 of the Schedule and on consideration of which the respondent-Assistant Collector also approved the revised classification filed by the petitioner. The correct legal position, therefore, is that deodorized cocoa butter is classifiable under Item No. 68 of the Schedule and not under Item No. 12. The classification made earlier was a mistake of law. The respondents also, acting under the mistaken interpretation of law, issued show cause notices to the petitioner, in pursuance of which the petitioner paid the duty for periods from 4-5-1974 onwards between the year 1978 to 1980. A mistake of law, in our opinion, does not cease to be mistake of law by lapse of time. It is also not material who was responsible for the mistake.

Once it is held to be mistake of law, it has to be considered accordingly. In the instant case, it was a mistake of interpretation of a tariff item and which is a question of law and a mistake in that regard is nothing but a mistake of law. The payments were made by the petitioner under such mistake of law. The period of limitation for refund laid down in Section 11B of the Act, therefore, cannot apply to such refunds. The petitioner is entitled to refund of such amounts.

8. The only question to be considered is whether the petitioner is entitled to refund of duty paid by it during the period of three years prior to the date of discovery of the mistake or to all refund claimed within three years from the date of discovery of the mistake. We do not find much difficulty on this count. It is well settled that the claim for refund of amounts paid under a mistake of law should be made within the period of three years from the discovery or knowledge of the mistake. The date of payment is not the relevant consideration. Reference may be made in this connection to the decision of a Division Bench of this court in Industrial Plastic Corporation Pvt. Ltd V. U.O.I. – 1992 (57) E.L.T. 390.

12. In view of the ratio of the decision of various High Courts we hold that denial of refund claim of the amount wrongly paid is in violation of Article 265 of Indian Constitution. As regards the claim of unjust enrichment, the respondent has proved that no tax has been charged from SEZ unit. The invoices issued to SEZ units along with sample copies of tax invoice shows that no service tax was charged from SEZ unit. The respondent has proved that the amount of refund claim has actually been borne by them and sanctioning of the refund

would not amount to unjust enrichment. We find that in the case of ECE Industries Ltd cited (Supra), the Tribunal has held as under:

> "5. I have considered the rival contentions and perused the records. There is no doubt that the nature of service rendered by the assessee was an exempted service which did not invite the levy of service tax and the original authority having been satisfied that a part of the claim for refund was eligible has sanctioned Rs. 3,33,299/-. The Ld. Commissioner (Appeals) though has reversed the same, there is no specific order with regard to the credit of the same into the Fund as required by Section 11B of the Central Excise Act, 1944, which means that the amount continued to remain only with the Revenue, which is clearly without authority of law. When there is no material on record to suggest that the appellant has, in fact, collected the service tax element despite the fact that the service was a non- taxable entity, the Revenue cannot retain the same without granting refund to the assessee.

13. Further, in the case of Commissioner of GST Rohtak Vs. Gawar Construction cited (Supra), the Hon'ble Punjab and Haryana High Court has held as under:

> *"7. The Tribunal rightly found that merely because the notification is termed as exemption notification, it does not bar any person who may have wrongly paid duty to seek refund. As regards plea of bar of jurisdiction and incompetent authority, the Tribunal found that firstly assessee moved an application to the Director General of Foreign Trade which was a wrong Forum to*

seek this refund but it did show that assessee was not acquiescent about its claim. As regards plea of unjust enrichment, the Tribunal found that along with the refund application, the respondent-assessee had appended a certificate from the Chartered Accountant attesting to the fact that the duty which has been paid, has been borne by the assessee and not passed on to anybody else.

8. Learned Counsel argues that finding of the authorities below regarding unjust enrichment has been wrongly discarded.

9. The argument has been rejected because, as noticed above, the assessee has supported his claim with the evidence of certificate by the Chartered Accountant but the Assistant Commissioner had rejected it holding that since the excise duty was 12.36%, the assessee must have passed on the burden to the purchaser.

10. As stated above, in the face of evidence of the assessee and lack of any evidence led in this behalf by the Revenue, this was a purely presumptive finding."

14. Further, in the case of Amrit Learning cited (Supra), the Tribunal has held as under :

"6. However, in the present case the value of service remained the same in all the three periods namely before it paid service tax, during the period when it paid service tax, and after that when it stopped paying service tax. This fact certainly provides a lot of

gravitas to the appellant's claim that the burden was not passed on to the customers. Then there is a certificate of Chartered Accountant certifying that the burden of tax was not passed on the service recipient. Further, the invoices did not show the component of service tax at all. All these factors put together constitute sufficient weight of evidence in the given facts and circumstances to infer that the appellant has been able to discharge its onus to establish that it did not pass on the burden of Service tax (which is being claimed as refund) to the service recipient.

7. In the light of the foregoing, we hold that the impugned refund is not hit by the doctrine of unjust enrichment. Consequently, we set aside the impugned order and allow the appeal with consequential relief."

12. In view of the various decisions cited (Supra), we are of the considered opinion that the erroneous payment of the duty/tax under mistake of law would not attract provisions of unjust enrichment as provided in Section 11B of Central Excise Act.

13. In view of the above discussion, we do not find any infirmity in the impugned order which we uphold by dismissing the appeal of the Revenue.

(Order pronounced in the open court on 13.09.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Kailash