CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>ALLAHABAD</u>

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70043 of 2020

(Arising out of Order-in-Appeal No.GZB/EXCUS/000/APPL-MRT/232/2019-20 dated 14/11/2019 passed by Commissioner (Appeals) Central Goods & Services Tax, Ghaziabad)

Commissioner of Central Goods & Services Tax, Meerut .....**Appellant**
(CGO Complex-II, Kamla Nehru Nagar, Ghaziabad)

VERSUS

M/s Baba Constructions Pvt. Ltd., ...**Respondent**

(A-20, Hig Duplex, Sanjay Nagar, Sector-23, Ghaziabad)

<u>APPEARANCE:</u>

Shri Santosh Kumar, Authorised Representative for the Appellant
Shri Rakshit Verma, Advocate for the Respondent

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

FINAL ORDER NO.70270/2023

DATE OF HEARING : 11 December, 2023
DATE OF DECISION : 11 December, 2023

<u>SANJIV SRIVASTAVA:</u>

This appeal is filed by the revenue against Order-in-Appeal No.GZB/EXCUS/000/APPL-MRT/232/2019-20 dated 14/11/2019 passed by Commissioner (Appeals) Central Goods & Services Tax, Ghaziabad. By the impugned order Commissioner (Appeals) has held as follows:-

> *"In view of the above discussion and findings, the impugned order is modified by allowing the entire amount to be paid to the credit of the appellant along with interest as mentioned in the foregoing para, and the appeal bearing No. 19/ST/APPL-MRT/GZB/ 2019-20 dated 07/05/2019, filed by M/s Baba Construction Private*

Limited, A-20, HIG Duplex, Sanjay Nagar, Sector-23, Ghaziabad, is allowed with consequential relief."

2.1 Respondents are engaged in providing service under the category of 'Construction of residential Complex Services' and 'Commercial or Industrial Construction Services'. Proceedings were initiated against the applicant by way of issuance of show cause notice dated 16/07/2013, demanding Service Tax amounting to Rs.13,68,35.539/- and Rs. 1,93,11,635/- respectively under Section 73(l) of the Finance Act 1994 along with interest u/s 75 and Penalty under section 76, 77 and 78 of the said Act. Vide Order-in-Original No.27-28/Commissioner/STIGZB/2013-14 dated 17/4/2014 passed by the Commissioner, Customs, Central Excise & Service Tax Ghaziabad, demands of Rs.3,37,11,817/-, Rs.9,86,831/- and Rs.2,53,269/- were confirmed against the applicant under Section 73 (l) of the said Act along-with interest under section 75 and various penalties U/S 76, 77 and 78 of the said Act were also imposed. Rs.96,92,428/- already deposited by the respondent during the time of investigation was appropriated against such confirmed demand and interest by the adjudicating authority.

2.3 Being aggrieved with the aforesaid Order-in-Original, the respondent preferred Appeal No.ST/53899/2014-CU[DB] before this Tribunal. Tribunal vide its Final Order No.ST/A/70404/2017-CU(DB) dated 24.04.2017 set aside the impugned Order-in-Original and allowed party's appeal with consequential benefits in accordance with law. Department's Civil Appeal filed against the above mentioned CESTAT Order was dismissed by the Hon'ble Supreme Court vide its Final Order under Ref.CIVIL APPEAL Diary No. 2271 2018 pronounced on 28/03/2018.

2.4 Consequently, respondent submitted a claim of refund of Rs.96,92,428/- on 19.04.2018 which was paid by him during investigation of the instant proceedings. In response to the deficiency memos issued by the Department on 24.04.2018 and 22.05.2018, the respondent has finally submitted refund claim in prescribed format along with supporting documents like copies of balance sheets, CA certificate, copies of relevant challans and other supporting documents on 20.08.2018.

2.5 Vide Order-in-Original dated 30.03.2019 the Assistant Commissioner, Central Goods & Services Tax, Ghaziabad sanctioned the refund claim of Rs.96,92,428/- and ordered to credit the same to the 'Consumer Welfare Fund' under Section 11B(2) of the Central Excise Act, 1944 as applicable to service tax matters under Section 83 of the Finance Act, 1994.

2.6 Being aggrieved by the order, respondents filed appeal before Commissioner (Appeals), who vide the impugned order allowed the appeal of the respondent. Aggrieved revenue have filed this appeal by stating as follows:-

- Commissioner (Appeals) has wrongly held that the bar of unjust enrichment does not apply to the instant case. He has also wrongly held that merely because it was shown as expenditure, the department cannot contend that pre-deposit made by the assessee is hit by unjust enrichment. Further, he also wrongly held that as the amount was to be treated as pre-deposit, the provisions of Section 35FF would apply for grant of interest.
- Reliance is placed on the following judgements:-
    - Sahkari Khand Udyog Mandal Ltd. Vs CCE & Cus 2015 (181) ELT 328 (SC);
    - Poorna Rolling Mills Vs CCE-I 2009 (240) ELT 85 (Tri.-Mumbai);
    - Rajsthan Spinning & Weaving Mills Ltd. Vs CCE, Jaipur-II 2006 (194) ELT 254 (Tri.-Del.);
    - Madhucon Bina Puri Vs CC, Mumbai 2015 (320) ELT 458 (Tri.-Mumbai);
- For challenging the interest under Section 35FF, reliance is placed on Board's Circular No.984/8/2014-CX dated 16.09.2014.

3.1 We have heard Shri Santosh Kumar learned Authorised Representative appearing for the revenue and Shri Rakshit Verma learned Counsel appearing for the respondent. 3.1

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 Commissioner (Appeals) in his order has observed as follows:-

> *"5. I have carefully gone through the facts and records of the case as well as the submissions made by the appellant and the respondent department. I find that there is no dispute that the amount was paid during investigation and Hon'ble CESTAT, Allahabad vide Final Order No. ST/A/70404/2017-CU(DB) dated 24.04.2017 had set aside the demand confirmed against the appellant and the appeal of the respondent department against the said order of Hon'ble CESTAT was dismissed by Hon'ble Apex Court vide order dated 28.03.2018 As the demand was set aside, the appellant became entitled to the amounts deposited by him during investigations, along with the applicable interest, as per law. The amounts so deposited by the appellant were not towards any tax liability but were merely a deposit with the department. Hon'ble High Court of Allahabad, in the case of CCE, Lucknow Versus Eveready Industries India Limited [as reported in 2017 (357) ELT 11 (Allahabad)], has held that:-*
>
>> *"4. ---payment was made during investigation by assessee. Subsequently, show cause notice was issued and Assessing Officer passed order adjudicating liability of Central Excise and amount deposited by assessee was appropriated against such determined liability. Subsequently, in appeal, assessment order was set aside and question of refund arose An argument was raised that unless assessee proves that he has not passed on incidence of duty to any other person, refund cannot be allowed. Court held, it is not a case of refund of duty but return of pre-deposit made by assessee at the*

time of investigation under protest. Court has said as under:-

> *"There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee."*

5. Madras High Court in Commissioner of Central Excise v. Pricol Ltd. (supra) relied on a Bombay High Court judgment in Suvidhe Ltd. v. Union of India - 1996 (82) EL.T. 177 (Bom.): and this Court's judgment in Summerking Electricals (P) Ltd. v. CEGAT - 1998 (102) ELT. 522 (All).

6. Against the judgment of Bombay High Court in Suvidhe Ltd. (supra), Revenue preferred an appeal before Supreme Court but High Court's view was maintained. The said judgment is reported in Union of India v. Suvidhe Ltd. - 1997 (94) E.LT. A159 (S.C.)."

5.1 Moreover, the Hon'ble High Court of Allahabad, in the case of Ebiz Com Private Limited Versus CCE & ST [as reported in 2017 (49) STR 389 (Allahabad)], has held as under: -

> *"23. It has been consistent view [of] various Courts that any amount, deposited during pendency of adjudication proceedings or investigation is in the nature of deposit made under protest or pre-deposit and, therefore,* ***principles of unjust enrichment would not be attracted****.*

> *35. The consensus of the authorities of various High Courts as well as Supreme Court is that any amount received by Revenue, as deposit or pre-deposit i.e. unauthorizedly or under mistaken notion, etc., cannot be retained by Revenue since it has no authority in law to retain such amount and it must be refunded with interest"*

5.2 In the present case there was no dispute that the amounts were deposited, during investigations, on the insistence of department, and therefore, as held by the Hon'ble High Court, the same was in the nature of deposit under protest and accordingly principle of unjust enrichment was not attracted.

5.3 I further find that the only reason given by the adjudicating authority for not crediting and paying the said amount to the appellant was that the impugned amounts were booked as expenditure by the appellant in his Profit and Loss Account. In this regard, I find that Hon'ble CESTAT, Hyderabad, in the case of Lakshmi Gayatri Iron & Steel Private Limited Versus CCE, Hyderabad-III [as reported in 2017 (358) ELT 462 (Tribunal-Hyderabad)], in a similar matter has held as under. -

> *"Refund-Unjust enrichment - Deposit made during investigation-Contention that amount deposited shown in assessee's books of account as expenditure and not as receivable, therefore incidence of duty had been passed on and refund claim hit by unjust enrichment -HELD Assessee deposited amount during investigation only with intention of reducing burden in case litigation goes against it No specific instances raised showing amount being passed on to others -* ***Merely because it was shown as expenditure, Department cannot contend that pre-deposit made by assessee hit by unjust enrichment*** *- Order of rejecting refund set aside - Section 11B of Central Excise Act, 1944."*

Accordingly, the amount deposited by the appellant was required to be refunded to him instead of being credited to the consumer welfare fund as has erroneously been done by the adjudicating authority.

6. The appellant has further submitted that he is also entitled for interest on delayed refund. In this regard, I find that the order confirming the demand was appealed against before the Hon'ble CESTAT who had set aside the same. The appellant, in order to prefer an appeal against the order confirming the demand, was required to make deposits in terms of Section 35 F of the Central Excise Act, 1944 as made applicable to Service Tax matters vide Section 83 of the Finance Act, 1994. In the absence of anything having been submitted by the appellant that the pre-deposit was waived by the CESTAT, the entire amount paid by the appellant became pre-deposit under the said Section 35 F ibid The appellant was, therefore, entitled to interest in terms of Section 35 FF of the Central Excise Act, 1944 as made applicable to Service Tax matters vide Section 83 of the Finance Act, 1994. However, the date from which interest is payable to appellant depends on the date (s) on which the deposits were made. I find that the appellant had paid the entire subject amount prior to the commencement of the Finance (No.2) Act 2014, (w. e. f. 06.08.2014) for which the interest payable would be governed by the provisions of the erstwhile Section 35FF of the Act which were applicable prior to its amendment (w. e. f. 06.08.2014). The appellant is, therefore, entitled to interest from expiry of three months from the date of communication of the Hon'ble CESTAT's Final Order dated 24.04.2017 till the actual payment of refund of the subject amount."

4.3 It is settled position in law that amounts which were deposited during the course of investigation were paid subsequently by the provider of the service, hence, could not have been based on to the service recipients. The expenses incurred subsequently in form of deposit made during the course of investigation are shown as revenue expenditure in the balance sheet of the respondent, as this amount has been shown as revenue expenditure in the balance sheet the same would justify the claim of the respondent. In case of Jageti & Co. [2012 (26) S.T.R. 415 (Tri. - Ahmd.)] tribunal has held as follows:

> *"Proceedings were initiated against the appellant on the ground that the appellant had exceeded the limit provided for eligibility of exemption from Service Tax as a small service provider. Proceedings were dropped by Order-in-Original No. SD-02/O-I-O, No. 42/08-09, dated 1-7-2008. As soon as the appellants were informed that they were not eligible for the benefit of small scale exemption available for service provider, they had paid the tax on 2-9-2006 with interest before issue of Show Cause Notice under protest. After the Order-in-Original was issued dropping the proceedings, the appellants filed refund claim claiming refund of Service Tax paid by them and interest thereon, which has been rejected. Hence, the appeal.*
>
> *2. Heard the both sides.*
>
> *3. The appellants submitted that refund claim has been rejected on the ground that the invoice issued by the appellant did not indicate Service Tax separately. Therefore, it has to be held that Service Tax has been collected from the customers. Further, it has also been held that in the Balance Sheet, the appellant had shown the expenditure as Revenue expenditure and therefore in view of the decision in the case of Keihin Fie Pvt. Ltd. v. C.C.E., Pune-I - 2009 (16) S.T.R. 71 (Tri.-Mum.), it has to be held that the Service Tax liability has been included in the value of services provided by them and therefore the same has been recovered. It was submitted that during the relevant time, the appellant was not paying Service Tax and therefore the question of collecting Service Tax does not arise. As regards Balance Sheet and Profit & Loss Account, it was submitted that the appellants followed the*

cash accounting method and therefore as soon as the Service Tax was paid, it was shown as Revenue expenditure.

4. Ld. A.R. for the Revenue adopts the logic and reasoning applied by the lower authorities for rejecting the refund.

5. I have considered the submissions made by both sides. The original adjudicating authority credited the refund amount to Consumer Welfare Fund and rejected the claim of interest with the following observations :

"I have perused the copies of invoices for the year 2005-2006 furnished by the said claimant and noticed that these invoices did not indicate that the Service Tax was exempt at the relevant time. I find that Section 67(2) of Finance Act, 1994 provides where the gross amount charged by a service provider, for the services provided or to be provided is inclusive of Service Tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged. In view of above facts, it is apparent that the gross amount charged by the said claimant was inclusive of Service Tax and as such the incidence of Service Tax had been passed on the service recipients."

6. The Commissioner (Appeals) simply observed that the appellant failed to produce concrete evidence to prove that the burden of Service Tax has been borne by them and has not been passed on for any other purpose.

7. When the appellant was not paying Service Tax and when after initiation of proceedings, Revenue had accepted their contention that they are eligible for exemption and not liable to Service Tax, how the original adjudicating authority can come to the conclusion that since the invoice had shown only gross amount. Service Tax has been collected, is surprising and cannot be comprehended. How can the original adjudicating authority say that the invoice did not indicate that Service Tax which was exempt at the *relevant time? Just because the appellant did not indicate that the Service Tax was exempt, conclusion cannot be reached that they have collected the Service Tax from the customers.*

8. Under these circumstances, I am unable to sustain the view taken by the authorities that on the basis of invoice, it can be concluded that the appellant had collected Service Tax. Only when Service Tax was payable and was held to be payable, the question of determination of gross amount included Service Tax or not, would arise. As regards Profit & Loss Account, if the appellant followed the cash accounting method, they cannot be found fault with for showing it as expenditure. In any case, it has been paid under protest and the expenditure is booked. This does not mean that what was paid before issue of Show Cause Notice was subsequently collected from the customers. As regards interest provisions of Section 11B of Central Excise Act, 1944 made applicable to Service Tax matters vide Section 83 of Finance Act, 1994 includes interest also."

4.4 Hon'ble Allahabad High Court in the similar situations in the case of CCE Vs Advance Steel Tubes Ltd 2018 (11) GSTL 341 (All.) has held as follows:-

6. *An investigation was made and the party debited an amount of Rs.15.00 lacs and another sum of Rs.3.75 lacs under protest on account of the said discrepancies.*

7. *Two show cause notices were issued to the party on 14.03.2002 and 28.05.2002.*

8. *The first notice dated 14.03.2002 was adjudicated and a demand of Rs.2,84,389/- was confirmed. A penalty of Rs.1,00,000/- was also imposed. This amount was appropriated out of the sum of Rs.15 Lakhs deposited by the party under protest. The penalty of Rs.1 lakhs was deposited by the party by way of a Challan dated 20.12.2002. The department preferred an appeal before the Hon'ble CESTAT against the said order which was dismissed on 29.05.2004 and the said order was accepted* *by the Commissioner, Central Excise, Ghaziabad on 21.07.2004.*

9. *Insofar as the second show-cause notice dated 28.05.2002 is concerned, a demand of Rs.32,38,036/- was raised against the party, and the matter was referred to the Settlement Commission, New Delhi. The Settlement Commission settled the aforesaid demand for an additional duty liability of Rs.5,55,731/-, which was also appropriated from the amount which was deposited by the assessee under protest. Immunity from the payment of penalty and interest was also granted vide Settlement Commission's order dated 11.06.2004.*

10. *Thus, on facts the admitted position is that the matter relating to discrepancies of the party were settled by the Settlement Commission for a total sum of Rs.8,40,150/-.*

11. *The assessee therefore, made a refund claim for a sum of Rs.10,34,000/-. The refund claim was rejected by the Adjudicating Officer by way of an order dated 06.05.2005 relying upon the judgement of the Apex Court by holding that the party had accounted for the duty paid under protest as expenditure in the balance sheet and costing of the products were finalized by taking into account the cost of raw materials along with manufacturing and other expenses and hence, the presumption was that the same has been passed on to the buyer in the form of incurred/enhanced costing for current and further supplies of the party's products.*

12. *Being aggrieved by this order, the party filed an appeal before the Commissioner(Appeals), who vide his order dated 30.09.2005, rejected the appeal on the ground that there was indirect unjust enrichment, since the amount was shown in the profit and loss account as revenue expenditure, the same had been passed on to the buyer in the form of incurred/enhanced costing for current and further supplies of the party's product.*

13. *Being aggrieved by this order passed by the Commissioner, the party filed an appeal before the CESTAT.*

14. *There was a difference of opinion between the two members. The first Member held that the matter was hit by unjust enrichment whereas the second Member came to the conclusion that it was not the case of unjust enrichment under the provisions of Section 11B of the Act, as the refund of claim can only be denied when the incidence of the duty whose refund has been claimed has been passed on as increased cost resulting in an increased sale price of goods to the buyers that is to say that the buyer has borne the burden of the excise duty. However, the second Member held that the facts in this case are quite different and the bar of unjust enrichment did not apply because the amount of Rs.18.75 lacs had been paid by the assessee under protest during investigation proceedings and even before the issuance of a show-cause notice.*

15. *The matter was, therefore, referred to the third Member. The third Member was of the categorical view that this was not the case of the unjust enrichment because the duty involved in refund was not paid at the time of clearance of goods but subsequently during the course of investigation for the past period. The goods had already been cleared earlier. The third Member also emphasized that the confirmed duty was adjusted from the pre-deposit made at the time of investigation by treating it as a sanctioned refund. Insofar as the the amount which had been taken by the department during investigation that is a sum of Rs.8,40,120/- the same had also been taken without considering the cost structure of the goods and despite that the department was invoking the bar of unjust enrichment to the balance amount for which the refund has been claimed and this would not be tenable.*

16. *Learned counsel for the department Shri Krishna Agrawal has very strenuously argued that the provisions of Section 12A and 12B of the Act are attracted in this case as in this case it seems on presumption that the burden had been passed on indirectly to the buyer.*

17. *However, the contest made in the present appeal is only with regard to the refund of balance amount of Rs.10 lacs and odd and no issues have been raised by the department with regard to any unjust enrichment in respect of amount which was adjusted by them for a sum of Rs.8,40,150/-.*

18. *Learned counsel for the department has relied on an Apex Court decision saying that even in cases where there may have been some indirect passing on of the burden to the assessee, but the refund is not liable to be made under Section 11B of the Act.*

19. *There is no quarrel with the law as it stands but insofar as the present case is concerned, the facts are completely different.*

20. *Shri Nishant Mishra, learned counsel for the assessee has argued that insofar as the provision of Section 12A of the Act is concerned, every manufacturer clearing the goods on payment of duty has to indicate on documents of assessment, sale invoices and other like documents the amount of excise duty which will form party of the price at which such goods are sold. It is his contention that the provision will not be attracted in the present case as the goods have already been cleared and the duty had been paid subsequently. He also argued that under Section 12B of the Act any person who paid the duty on goods shall be deemed to have passed on the incidence of duty unless contrary is proved by that person. In this case duty involved in refund was not paid at the time of clearance of goods, but subsequently during the course of investigation for the past period and therefore, it was his contention* *that the incidence has not been passed on by them to any other person.*

21. *The third Member has also taken note of this in his judgment and has noted that a sum of Rs.8,40,120/- had been adjusted by the department from the amount of Rs.18,75,000/-. This amount had been paid by way of debit entries RG23A and therefore, he has come to the conclusion that if the amount of Rs.8,40,120/- was adjusted without invoking the bar of unjust enrichment to the said amount. The department was not justified in applying the bar of unjust enrichment to the remaining amount of Rs.10,34,880/- without there being any cogent material or evidence to support it and without the department having considered the cost structure of goods for that amount.*

22. *Having heard the learned counsels for both sides and having examined the case laws as relied by both sides, we are of the opinion that the final decision taken by the third Member that the bar of Section 11B of the Act did not apply in the present case, is correct and justified.*

4.5 Since the issue is squarely covered by the above referred decision of Hon'ble Jurisdictional High Court, we do not find any merits in this appeal filed by the revenue.

5.1 Appeal is dismissed.

(Operative part of the order pronounced in open court)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp