CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
OLD RED BUILDING, 38,M.G.Marg,CIVIL LINES, ALLAHABAD

Dated: 11/5/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70177-70178/2016 SM dated 29/04/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
ST/CO/3866/2012	ST/2389/2012 &ST/55964/2014	COMMISSIONER OF CENTRAL EXCISE, LUCKNOW 7-A, ASHOK MARG, LUCKNOW
	Name and Address of Respondent	ELDECO HOUSING & INDUSTRIES P LTD 2[ND] FLOOR, ELDECO CORPORATE CHAMBER-1, VIBHUTI KHAND GOMTI NAGAR, LUCKNOW(UP)

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s SH T K.SRIVASTAVA,ADV
311, MURLI BHYAWAN
ASHOK MARG, LUCKNOW

4 Bar Association, CESTAT, ALLAHABAD
5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi – 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38
13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
14 C.D.R. 15 Office Copy 16 Guard File.17.M.S KNOWLEDGE PROCESSING PVT LTD(TAMMANAGEMENTINDIDA.COM)

Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. 1
ST/CO/3866/2012
APPEAL No.ST/2389/12 with ST/CO/3866/2012
& ST/55964/14-SM

(Arising out of Order-in-Appeal No. 142-ST-APPL-LKO-KNP-2012 dated 27/04/2012 & 103-ST/LKO/2014 dated 21/08/2014 passed by Commissioner of Central Excise & Service Tax, Lucknow)

For approval and signature:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	yes

Commissioner of Central Excise, Lucknow **Appellant**
(In Appeal No.ST/2389/12)

Vs.

Eldeco Housing & Industries P Ltd. **Respondent**

&
Eldeco Housing & Industries P Ltd. **Appellant**
(In Appeal No. ST/55964/14)

Vs.

Commissioner of Central Excise, Lucknow **Respondent**

Appearance:

Shri Pawan Kumar Singh, Supdt (AR) for Revenue

Shri T.K. Srivastava, Advocate for Assessee

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

Date of Hearing : 29/04/2016
Date of Decision : 29/04/2016

Final ORDER NO. 70177-70178/2016

Per: Anil Choudhary

Both the assessee and the revenue are in appeal. As the issue is common and arising for the same set of facts and transaction the appeals are taken up whether for disposal for the set of convenience.

2. Heard the parties.

3. The brief facts are that the Eldeco Housing & Industries P. Ltd. are in the business of Construction of Residential Flats or units and are registered with the Service Tax Department under the category "Construction of Commercial and Industrial Structures" and under the category "Construction of Complex Service". During the period 2006-07 the appellant constructed and sold some flats to various buyers. On being so advised by the revenue that they are liable to pay service tax on the flats constructed and sold, the appellant deposited service tax amounting to Rs.47,30,316/- vide 7 TR-6 challans. Subsequently, in view of CBEC Circular No. 332/35/2006-TRU dated 01/08/2006 the appellant assessee filed refund claim as it was clarified by the circular that service tax was not payable in the facts of the assessee that they have constructed the flats on their own account and sold the flats. The

refund claim was filed on 21/12/2006. Pursuant to receipt of the refund claim, defect memo was issued dated 19/02/2007. In response to the defect memo appellant removed defects on 11/09/2007. That further ~~said~~ details were filed on 16/03/09, along with the original copy of TR-6 challans, as per the Order-in-Original dated 10/08/11. During the pendency of the adjudication of the refund application, the refund application after some processing was again returned back by the revenue on 20/04/09, with the observation that the TR-6 challans dated 31/03/2006 & 08/06/06, for Rs.25 lakhs+4 lakhs pertains to deposit of service tax under the Head "Maintenance and Repair Services" whereas the assessee was never registered under the said head. The assessee again submitted that the refund claim on 24/05/2010 revising the refund amount Rs.30,44,360/- thus reducing the refund claim by an amount of Rs.16,85,956/- which had been collected from the customers on account of service tax. Finally, the refund claim was allowed for the amount of Rs.30,44,360/- after examining the provisions of unjust enrichment and considering the Master circular dated 23/08/2007, read with circular number 332/35/2006-TRU and considering the ruling of the Apex Court in the case of IDL Chemicals V/s Union of India 1996 (86) ELT-182, in which Apex Court has held that the person who has borne the burden of taxes, which is not actually payable by him, is entitled for the refund from the Department and has full locus standi to seek the refund. Being aggrieved the revenue preferred an appeal before Commissioner (appeals) on the ground that the adjudicating authority have erred in relying upon the affidavit of the assessee in believing realization of Rs.16,85,956/- from the customers. Further the adjudication order reveals that no effort have been made to verify the deposit of this amount by the party in Govt. Exchequer and whether the amount in question Rs.30,44,360/- had been received by the party from their customers or not. For the deposit of service tax under the Head-Repair and Maintenance Services, though the assessee is involved in construction of buildings requires proper verification and further the element of unjust enrichment it appeared, have not been considered in proper perspective, vide Order-In-Appeal dated 03/01/13 the ld. Commissioner (appeals) was pleased to reject the appeal upholding the Order-in-original, observing that the issue of unjust enrichment has been considered properly and categorical finding is recorded for the same by the adjudicating authority. Further observed that quantum of refund have been properly verified and further the books of accounts of the appellant have been audited by a Chartered Accountant, with observation "I find that the burden of service tax has not been passed on to the customers. Further the amount of refund claim had been shown in the balance-sheet in the account receivable head on the asset side, which indicates that the amount had not been received by the party from their customers." So far the issue of deposit of tax under wrong head, it was observed that the adjudicating authority considered the issue and decided the same in favour of the assessee, in view of the ruling of the Honourable Supreme Court in the case of IDL Chemicals (supra). So far the issue of time barred is concerned the learned Commissioner held that the refund is within the permissible period of one year from the date of payment, which implies that the first date of submission of refund has been taken as the actual date of submission, which is legal and proper in view of the rulings of the tribunal, High Court and as held in the case of Universal Cylinders v. CCE 2004 (178) ELT-898, has held that-Refund claim was returned as there were no supporting documents and the same were submitted later with the required documents, held that the date of submission will be the original date of submission. Being further aggrieved the Revenue is in appeal before this Tribunal on similar grounds which were taken in the first appeal before the Commissioner (appeals). The assessee is in cross objections against the appeal of the revenue.

4. After withdrawing part of the refund claim of the 16,85,956/- (which was withdrawn on the ground that the said amount was collected by the assessee from the buyers of the flat) the appellant again filed the refund claim with the revenue in form, on date 11/06/12 received in the revenue office on 22/06/12 for refund of Rs.16,85,956/-, claim to have been wrongly paid by them. After issue of defect memo and some correspondence, show cause notice dated 02/11/12 was issued requiring the appellant to show cause as to why refund claim should not be rejected on the ground that they do not fulfill the conditions and for that the refund appears to be time barred as well as on the ground of unjust enrichment. The appellant appeared and contested the show cause notice stating therein that the customers

of the appellant are demanding refund of the service tax amount paid by them, in view of the clarification by the board that service tax was not payable and accordingly, the refund may be granted directly to the buyers of the flats. It was also mentioned that some of the buyers have moved before the Consumer Courts. The said claim was adjudicated vide O-I-O dated 03/01/13, rejecting the refund claim on the ground that the claim is hit by the provision of unjust enrichment, it was also held that the claim is time barred as the relevant date for filling ~~a~~ refund claim was 30/05/2007, that is one year from the date of payment of service tax which was deposited during the period 31/5/2006 to 4/11/2006, deposited vide 7 challan's. Being aggrieved the appellant preferred appeal before the Commissioner (appeals) and vide O-I-A dated 21/08/14, the appeal was rejected, observing that refund was filed consequent upon issue of board circular dated 01/08/2006, with the revenue on 21/12/2006 and further on discussion with the Department, the appellant withdraw the refund claim and as such it is admitted fact that the amount of the 16,85,956/- have been collected by the appellant assessee from their customers. The refund claim was rightly rejected on the ground of unjust enrichment. Further as regards the issue of time barred, the learned Commissioner observed that in absence of documentary evidences before him, the findings could not be examined. Being aggrieved the appellant assessee is in appeal before this Tribunal.

5. Having considered the rival contentions, so far the appeal of revenue is concerned, I find that the grounds are the same which were

before the Commissioner (appeals) and the same have been properly considered in the Order-in-Appeal. After going through the findings in the Order-in-Appeal, I hold that neither the doctrine of unjust enrichment is attracted with respect to the refund of Rs.30,44,360/- nor the issue of time bar is attracted. Further I hold that, as it has been clarified by the CBEC that service tax was not payable on the transactions of the appellant with respect to construction and sale of flats during the financial year 2006-07, the deposit of tax made by the assessee takes the character of deposit, and is not tax. The doctrine of unjust enrichment is attracted only in the case of deposit of tax. Further from the perusal of documents, and the orders of the Court below, I find that the adjudicating authority have examining in detail the issue of unjust enrichment. The issue of time barred was also verified, as well as the amount refundable, and there is no interference required. So far the appeal of the assessees is concerned, I find that although the assessee is not entitled to refund of Rs.16,85,956, but it is customers of the assessee, who purchased flats, are entitled to the refund. It appears, the appellant have filed the details of his customers, with the revenue in the adjudication of the refund proceedings. The assessee also mentioned that the customers are pressing for refund and some of them have also approached various judicial forums, including the Consumer forum. In view of this matter, I set aside the impugned order and remand the issue back to the adjudicating authority, who shall examine the whereabouts of the person's who deposited the service tax to the appellant, for the purchase of flats, and after such verification having been carried out, shall grant refund to the buyers of the flats out of the said amount of Rs.16,85,956/-. The appellant is also directed to furnish the names, parentage and proper addresses of the buyers of the flats, with the details of the amount collected from them on account of service tax and the deposit of tax with the revenue. The appellant shall also extend any further co-operation as required by the Adjudicating Authority in the matter. The Adjudicating Authority shall issue the refund cheques in favour of the respective buyers of the flats, to which the appellant assessee shall not be entitled to make any objection. Accordingly the assessee's appeal is allowed by way of remand, with directions. To sum up, the appeal of revenue number ST/2389/12 is dismissed, cross objection are disposed of and appeal of assessee number ST/55964/14 is allowed by way of remand to the adjudicating authority with directions.

(Dictated in Court)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

akp

प्रमाणित प्रति / Certified True Copy
7.6.16
सहायक रजिस्ट्रार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
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