CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017
COURT No. II
APPEAL No. ST/320/2011

[Arising out of Order-in-Original No. 747/S. Tax/ D-II/10 dt. 06.12.2010 passed by the Commissioner of Central Excise, Delhi-II.]

Date of hearing: 23.05.2017
Date of pronouncement : 27.03.2018

For approval and signature:
Hon'ble Mr. Devender Singh, Member (Technical)

Veer Overseas Limited. : Appellant(s)

VS

CCE & ST Panchkula. : Respondent(s)

Appearance:
Sh. Abhishek Gupta, Advocate for the Appellant(s)
Sh. Satyapal, AR for the Respondent(s)

CORAM:
Hon'ble Mr. Devender Singh, Member (Technical)

Interim Order No. 20/2017 dt. 7/9/2017

Final Order No. 61991/2018 dt. 27/03/2018

Per : Devender Singh

The appellants have filed this appeal against the Order-in-Appeal No. 747/S. Tax/ D-II/10 dt. 06.12.2010 passed by the Commissioner of Central Excise, Delhi-II. The brief facts of the case are that the appellants filed two refund claims of Service Tax paid as recipients of service on the services received from the Foreign Commission Agent under Business Auxiliary Services. The claims were filed on the ground that the said tax was paid by them inadvertently as the same was otherwise exempt under

Notification No. 13/2003-ST dt. 20.06.2003 as amended. The said notification exempts Business Auxiliary Services provided by a Commission Agent in relation to sale or purchase of agricultural produce from the Service Tax leviable under Section 66 of the Finance Act, 1994. The appellants are in the business of export of Rice. The claim of the appellants had been rejected by both the lower authorities on the ground that the refund was filed beyond the statutory time limit of one year prescribed under Section 11B of the Central Excise Act, 1944. Aggrieved from the order of the Ld. Commissioner (Appeals), the appellants have filed this appeal.

2. Ld. Advocate for the appellants submits that Service Tax pertaining to these claims was deposited on 11.02.2008, 07.04.2008 and 25.04.2008 and the two refund claims were filed on 01.02.2010 under Section 11B of the Act. He contended that the assessee deposited Service Tax on the service of Foreign Commission Agents for the export of rice, inadvertently which was exempted from payment of Service Tax. He relied on the Circular No. 143/12/2011-ST dt. 26.05.2011 issued by CBEC clarifying that the Business Auxiliary Service provided by Commission Agents stationed abroad to promote the export of rice is covered by the Notification No. 13/2003-ST. He also relied on the following Judgments:-

> *1). M/s Geojit BNP Paribas Financial Services Ltd. Vs. Commissioner of Central Excise Customs & Service Tax, Kochi – WP (c) No. 18126 of 2015 (M)*
>
> *2). Monnet International Ltd. Vs. CCE, New Delhi – Final Order Nos. 52170-52171/2017, CESTAT, New Delhi.*

3. On the other hand, Ld. AR defended the order of the Ld. Commissioner (Appeals) and stated that the Ld. Commissioner (Appeals) had rightly relied upon the order of this Tribunal in the case of CCE, Hyderabad-III Vs. XL Telecom Ltd. – 2006 (206) ELT 303 (Tri. – Bang.) in which it was held that statutory time limit was applicable even for refund of illegal levy and time limit could not be extended any authority or Court. He also relied on the case of Miles India Ltd. Vs AC, Customs, 1987 (30) ELT 641 (SC).

4. Heard the parties and perused the records.

5. I find that the Service Tax was paid in the category of the Business Auxiliary Services on account of payment of Service Tax for the Foreign Commission agents. The amendment in the Notification No. 13/2003 wherein the agricultural produce was inserted in the preamble and by way of an explanation was brought about on 09.07.2004. In the said explanation, rice was also included. As a result of further amendment dt. 07.06.2005 in the Notification No. 13/2003, clause (i) of the explanation was deleted. The said clause (i) pertained to the definition of the Commission agents. The CBEC clarification dt. 26.05.2011 made it clear that the commission agents stationed abroad were covered by the Notification No. 13/2003-ST. Hence, the first question is whether the Service Tax which was paid by the appellants was due to mistake of law. I find that the clarification dt. 26.05.2011 did not exist on the date of payment of the Service Tax. The amended Notification No. 13/2003, from which

the clause (i) had been deleted, provided for "the commission agents in relation to sale or purchase of agriculture produce" from the Service Tax leviable thereon under Section 66 of the said Act. Hence, clearly the activity of foreign commission agents was not covered in the said notification as it referred to Section 66 (2) of the Finance act, 1994 and not to Section 66 A of the Finance Act, 1994 or Rule 2 (I) (d) (iv) of the Service Tax Rules. So the payments made by the appellants on the dates of payment were not on account of any mistake of law or mistake of fact. In their defence before adjudicating authority, the assessee had submitted that they had to deposit Service Tax on the impugned service being recipient of service provided by foreign commission agents. Subsequently, they filed refund claim on 01.02.2010 contending that the Service Tax was paid inadvertently. However it was only on 26.05.2011 that a clarification was issued by the CBEC, which clarified that

> *"Also where the commission agents stationed abroad provide business auxiliary service to promote the export of rice, said business auxiliary service is covered by Notification No. 13/2003–ST (as amended) because, the word 'rice' is mentioned under the explanation to the terms 'agricultural produce', in the inclusive portion along with other items like cereals, pulses, etc."*

Thus, as a result of this clarification dt. 26.05.2011, the benefit of this exemption notification No. 13/2003 became available to the appellant and the amount collected by the Revenue was therefore without any authority. It is settled position in law that beneficial circular has to be applied retrospectively while oppressive circular has to be applied prospectively.

6. However, on the question of limitation, I find that there are conflicting decisions of the Division Benches of this Tribunal on whether the statutory time limit under Section 11B of the Central Excise Act, 1944 is applicable to claim for refund of tax which was collected without authority of law. In the case of Monnet International Ltd. Vs. CCE, New Delhi (supra), relied upon the appellants, the Tribunal has held as below:-

> *"17. Thus, we are of the view that in the instant case, the amount deposited by the assessee-Appellants without any authority of law cannot be considered as Service Tax. As per Article 265 of the Constitution, no tax can be collected without any authority of law. At the relevant time, there was no authority of law to collect Service Tax on the activity carried out by the assessee-Appellants. Hence, Section 11B of the Central Excise Act, 1944 is not applicable. The amount was deposited in the year 2006-2007 and the refund was filed on 02nd January, 2008. Hence, the claim has been made within the period of three years prescribed by Hon'ble Delhi High Court. Therefore, we are of the view that the assessee-Appellants are entitled to get the refund and the same is not hit by the limitation prescribed under Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance act, 1994.*
>
> *18. Moreover, it may be mentioned that the Department should not take advantage of the ignorance of the assessee-Appellants as per the ratio laid down in the case of Parekh Bros Vs. CIT (1984) 150 ITR 105 and CIT Vs. Maha Laxmi Sugar Mills (1986) 160 ITR 920 (SC).*
>
> *19. In the instant case, we are of the view that it is not a case of refund of tax, but return of deposit for which limitation (Section 11B of the Act) is not applicable. Hence, we set aside the impugned order and direct the jurisdictional Commissioner to return the deposited amount, as per law."*

7. I also find that in the case of CCE, Hyderabad-III Vs. XL Telecom Ltd. – 2006 (206) ELT 303 (Tri. – Bang.), relied upon by the Revenue, the Division Bench of this Tribunal held as below:-

"4. On a careful consideration, we notice that the Revenue has taken a well sustained ground. For the reason that the Apex Court in the case of Asst. Commissioner of Customs v. Anam (supra) had laid down in very clear terms that even in respect of claim for refund of an "illegal levy", the statutory time limit prescribed in terms of Section 11B of CE Act and Section 27 of Customs Act is not extendable by any authority or court. The Apex Court has given this clarification in the light of the earlier judgments rendered in the case of Mafatlal Industries Limited v. UOI reported in 1997 (89) E.L.T. 247 (SC). The order of court on this point is reproduced hereinbelow :

2.?So far as the question of levy of surcharge of ten per cent which is in issue herein is concerned, we affirm the judgment and order of the Madras High Court. So far as the question of refund is concerned, it is obvious that it shall be governed by the law declared in Mafatlal Industries v. Union of India — 1997 (89) E.L.T. 247 (S.C.) = 1996 (9) scale 457, read with Clause (6) of the format order, a copy of which is enclosed herewith, which is as follows :

"Where a refund application or an appeal is preferred under and in accordance with the directions (1), (2), (3) and (4) above, the same shall be entertained only if the applicant for refund/appellant files affidavit stating that he has not passed on the burden of the duty, which is claimed by way of refund, to another person. In case the applicant for refund is a company or a society, the affidavit shall be sworn by the Managing Director or the Principal Officer of the Company or the Society, as the case may be. Such an affidavit shall be treated as an averment/assertion which an applicant for refund has to make in terms of the judgment in Mafatlal".

3.?The appeals are disposed of in the above terms. No costs.

FORMAT ORDER

Pursuant to the directions given in Mafatlal Industries v. Union of India — 1997 (89) E.L.T. 247 (S.C.) = 1996 (9) scale 457, the appeals/Special Leave Petitions coming up for disposal shall be disposed of in terms of one or the other of the clauses below :

(1)?Where a refund application was filed by the manufacturer/purchaser beyond the period prescribed by the Central Excise Act/Customs Act in that behalf, such petition must be held to be untenable in law. Even if in any appeal, suit or writ petition, direction has been given that the refund application shall be considered with reference to the period of limitation prescribed in the Central Excise Act/Customs Act - or that the period of limitation shall be taken as three years - such a direction of the Appellant Court/Civil Court/High Court shall be deemed to be unsustainable in law and such direction shall be set aside. The period prescribed by the Central Excise Act/Customs Act for filing a refund application in the case of "illegal levy" cannot be extended by any Authority or Court.

(2)?Where, however, a refund application was filed within the period prescribed by the Central Excise Act/Customs Act but has been dismissed wholly or partly on any ground and the said order is questioned by way of a writ petition or a suit or any appeal arising therefrom the manufacturer/purchaser shall be entitled to withdraw the writ petition, suit or an appeal arising therefrom, as the case may be, and file an appeal before the appropriate appellate authority within sixty days from today. It is clarified herewith that even in a case where such writ petition has been allowed and an appeal filed by the Revenue is pending, the writ petitioner shall be entitled to withdraw the writ petition, in which event, the Revenue appeal shall be disposed of permitting the writ petitioner to withdraw the writ petition to pursue the remedy proposed hereby. If such an appeal is filed, it shall be entertained without raising an objection on the ground of limitation and shall be dealt with in accordance with law. This direction shall apply even in cases where the High Court or Civil Court is approached after exhausting the remedy of appeal to Collector (Appeals). He can file an Appeal to C.E.G.A.T. within sixty days from today, after withdrawing the writ petition or the suit, as the case may be.

(3)?Where, however, a writ petition or suit claiming refund was filed directly in the High Court/Civil Court (i.e., without filing a refund application), the petitioner/plaintiff shall be entitled to withdraw such writ petition/suit or any appeal arising therefrom and prefer a refund claim under Section 11B within sixty days from today provided the writ petition or suit was filed within the period prescribed by the Central Excise Act/Customs Act for filing the refund application. It is clarified herewith that even in a case where such writ petition has been allowed and an appeal filed by the Revenue is pending, the writ petitioner shall be entitled to withdraw the writ petition, in which event, the Revenue appeal shall be disposed of permitting the writ petitioner to withdraw the writ petition to pursue the remedy proposed hereby.

(4)?The above rules, however, do not apply in the case of a claim for refund of duty levied and recovered under an unconstitutional provision. In such a case, the period of limitation shall be prescribed in Mafatlal Industries. The duty to allege and prove that the duty has not been passed on to another person, of course, remains even in such a case.

(5)?Where a person challenges the constitutionality of a provision in the Central Excise Act/Customs Act in a High Court or the Supreme Court but fails in his challenge to constitutionality, he cannot take advantage of the decision in the case of another person striking down the said provision, as explained in the judgment. This rule is evolved in the particular context of refund claims under these two enactments and has to be observed.

(6)?Where a refund application or an appeal is preferred under and in accordance with the directions (1), (2), (3) and

(4) above, the same shall be entertained only if the applicant for refund/appellant files affidavit stating that he has not passed on the burden of the duty, which is claimed by way of refund, to another person. In case the applicant for refund is a company or a society, the affidavit shall be sworn by the Managing Director of the Principal Officer of the Company or the Society, as the case may be. Such an affidavit shall be treated as an averment/ assertion which an applicant for refund has to make in terms of the judgment in Mafatlal.

(7) (a) Where the refund claim is rejected by this Court, the assessee who has already obtained any amount by way of refund shall be liable to pay back the same to the Department and the Department shall be entitled to recover the same in accordance with law.

(b) If the refund claim is rejected by an authority under the Act and where the assessee has already obtained the refund he shall be liable to pay back the said amount to the Department according to law and the Department shall be entitled to recover back the said amount, subject to orders, if any, by an Appellate Authority.

In view of the above clarification given by the Apex Court in term of Mafatlal's case (supra), the refund application even in respect of "illegal levy" or amounts collected beyond the recoverable duty is required to be filed within the period of limitation prescribed under Section 11B of CE Act. Respectfully following the ratio of the Apex Court judgment, the order passed by the Commissioner (A) is set aside and the appeal is allowed."

8. It is worthwhile to mention that the decision of CCE, Hyderabad-III Vs. XL Telecom Ltd. (supra) was not brought before the Bench considering the issue in the case of Monnet International Ltd. Vs. CCE, New Delhi (supra).

9. In view of the divergent views of this Tribunal on the same issue, therefore as held by the Hon'ble Supreme Court in the case of M/s Gammon India Ltd. Vs. Commissioner of Customs, Mumbai – 2011 (269) ELT 289 (SC), the matter requires reference to the Hon'ble President for constitution of a Larger Bench. Hence, I refer the matter to the Hon'ble President for constitution of a Larger Bench of this Tribunal to decide the following issue:-

"(a) Whether in respect of the claim for refund of illegal levy of Service Tax or of Service Tax collected without authority of law, the statutory time limit prescribed in terms of Section 11B of Central Excise Act 1944 will be applicable or not?"

10. Registry is directed to take appropriate steps for referring the matter to the Hon'ble President.

(Order pronounced in the Court on 07.09.2017)

Devender Singh
Member (Technical)

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**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C,
CHANDIGARH.**

COURT NO. I

DATE OF HEARING : 05/03/2018
DATE OF DECISION: /03/2018.

Service Tax Appeal No. 320 of 2011 – Larger Bench

M/s Veer Overseas Ltd.
Appellant

Versus

CCE, Panchkula
Respondent

Appearance

Shri Abhishek Gupta, Advocate – for the appellant

Shri Satyapal and Ms. Seema Arora, Authorized Representative (DRs) – for the Respondent.

CORAM: **Hon'ble Shri Justice Dr. Satish Chandra, President**
Hon'ble Shri Ashok Jindal, Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Interim Order No. _____/2018 Dated : __/03/2018

Per. B. Ravichandran :-

The Larger Bench is constituted to decide an issue referred to by a Single Member vide his interim order No. 20/2017 dated 07/09/2017.

2. The brief facts of the case are that the appellants filed two refund claims of service tax paid on reverse charge basis in

respect of services received from foreign commission agents taxable under business auxiliary service. The appellants paid the service tax and later realized that in view of exemption under Notification No. 13/2003-ST dated 20/06/2003 no tax is payable. The said notification exempted business auxiliary service provided by commission agents in relation to sale or purchase of agricultural produce. The appellant were engaged in the business of export of rice and foreign agents provided such business auxiliary service. Realizing that the services received by them are exempt the appellants filed claims for refund of tax already paid. The claims were rejected by the Original Authority on the ground that these were barred by limitation. On appeal, the Commissioner (Appeals) confirmed such rejection.

3. On further appeal before the Tribunal, the matter was heard by a Single Member who passed the present interim order. The Single Member Bench referring to the decision of the Tribunal in **Monnet International Limited vs. CCE, New Delhi (final order No. 52170-52171 of 2017 dated 08/03/2017**) and in **CCE, Hyderabad – III vs. XL Telecom Ltd. – 2006 (206) E.L.T. 303 (Tri. – Bang.)** recorded that there were divergent views of this Tribunal on the same issue and accordingly a reference was made for constitution of Larger Bench. The specific reference is as below :-

> "(a) Whether in respect of the claim for refund of illegal levy of Service Tax or of Service Tax collected without authority of law, the statutory time limit prescribed in

terms of Section 11B of Central Excise Act 1944 will be applicable or not?".

4. With the above background, we have heard learned Counsel for the appellant and the learned AR for the Revenue extensively. The learned Counsel for the appellant submitted that the appellant need not have paid the amount as service tax. Since, the said amount is not to be considered as a tax, the same should be returned to the appellants without limitation referred to in Section 11B. It is his submission that the said amount is not a tax and is to be considered as a deposit with the Government and the appellant is entitled for return of the said money. Relying on the decision of the Tribunal in **Monnet International Ltd.** (supra), the learned Counsel submitted that the time limit under Section 11B is not applicable.

5. The learned AR strongly contested the submission of the appellant. He submitted that the amount was paid as a service tax and the claim has to be processed under the statutory provisions for return of such tax in terms of Section 11B. Section 11B governs of situations of wrong payment, excess payment of tax/duty and the officers dealing with any claim for return of tax are governed by the said section. The statutory provisions being very clear no authority can act beyond the clear legal provision. He drew our attention to the 9 Member Bench decision of Hon'ble Supreme Court in **Mafatlal Industries Ltd. Vs. Union of India – 1997 (89) E.L.T. 247 (S.C.)**. The present service tax payment is neither an unconstitutional levy nor illegal levy.

Normally, service tax was payable on reverse charge basis in such situation. The appellants were exempted from payment of such tax because of the nature of goods exported. Such payment of tax can be refunded within the framework of Section 11B and the tax authorities have no power to go beyond this.

6. We have examined the decision of the Tribunal in **Monnet International Ltd.** (supra). The said decision relied on certain case laws regarding applicability of limitation of three years and non-applicability of Section 11B in certain situations. Further, we note that in the said case there was no tax liability at all as the services were not subjected to tax. In the present case, the services were liable to tax and by way of an exemption notification services in respect of certain commodities were exempted. One more important aspect to be considered is that the amount paid by the appellant has been deposited under a proper service tax head of account by a payment challan. The said amount has been appropriated by the Government as service tax. Later, the appellant realized that the services were exempt by a notification. The amount already paid was in the form of a tax through the Jurisdictional Authorities and the same has been accounted and appropriated by the Government as a tax. Section 11B of the Central Excise Act, 1944 made applicable to service tax refund clearly stipulates that any person claiming refund of any duty of excise to make an application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of one year from the relevant date in such form and

manner as may be prescribed and the application shall be accompanied by such documentary or other evidence as the applicant may furnish to establish that the amount of duty of excise in relation to which said refund is claimed was collected from or paid by him and the incidences of such duty had not been passed on by him to any other person.

7. What is crucial is that the appellants paid the claimed amount as service tax. They have approached the Jurisdictional Authority of service tax for refund of the said money. It is clear that the Jurisdictional Service Tax Authority is governed by the provisions of Section 11B as the claim has been filed as per the said mandate only. Here, wehave specifically asked the learned Counsel for the appellant under what provision of law he is seeking the return of the money earlier paid. He admitted that the claim has been preferred in terms of the provisions of Section 11B. If that being the case, it cannot be said that except for limitation other provisions of Section 11B will be made applicable to the appellant. The learned Counsel also did not advance such proposition. He repeatedly submitted that the amount is paid mistakenly. The same is not a tax and should be returned without limitation as mentioned in Section 11B. we are not convinced by such submission.

8. Here it is relevant to note that in various cases the High Courts and the Apex court have allowed the claim of the parties for refund of money without applying the provisions of limitation under Section 11B by holding that the amount collected has no

sanctity of law as the same is not a duty or a tax and accordingly the same should be returned to the party. We note such remedies provided by the High Courts and Apex court are mainly by exercising powers under the Constitution, in writ-jurisdiction. It is clear that neither the Jurisdictional Service Tax Authority nor the Tribunal has such Constitutional powers for allowing refund beyond the statutory time limit prescribed by the law. Admittedly, the amount is paid as a tax, the refund has been claimed from the Jurisdictional Tax Authorities and necessarily such tax authorities are bound by the law governing the collection as well as refund of any tax. There is no legal mandate to direct the tax authority to act beyond the statutory powers binding on them. The Hon'ble Supreme Court in **Mafatlal Industries Ltd.** (supra) categorically held that no claim for refund of any duty shall be entertained except in accordance with the provisions of the statute. Every claim for refund of excise duty can be made only under and in accordance with Section 11B in the forms provided by the Act. The Apex court further observed that the only exception is where the provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation of any of the Constitutional limitations. This is a situation not contemplated by the Act. We note in the present case there is no such situation of the provision of any tax levy in so far as the present dispute is concerned is held to be unconstitutional. As already held that the appellant is liable to pay service tax on reverse charge basis but for the exemption which was not availed by them. we hold that the decision of the Tribunal in **Monnet International Ltd.** (supra) has no application to decide the dispute in the present referred case. We take note of the decision of the Tribunal in **XL Telecom Ltd.** (supra). It had examined the legal implication with reference to the limitation applicable under Section 11B. We also note that the said ratio has been consistently followed by the Tribunal in various decisions. In fact, one such decision reached Hon'ble Supreme Court in **Miles India Limited vs. Assistant Collector of Customs – 1987 (30) E.L.T. 641 (S.C.)**. The Apex court upheld the decision of the Tribunal to the effect that the Jurisdictional Customs Authorities are right in disallowing the refund claim in terms of limitation provided under Section 27 (1) of the Customs Act, 1962. We also note that in **Assistant Collector of Customs vs. Anam Electrical Manufacturing Co. – 1997 (90) E.L.T. 260 (S.C.)** referred to in the decision of the Tribunal in **XL Telecom Ltd.** (supra), the Hon'ble Supreme Court held that the claim filed beyond the statutory time limit cannot be entertained.

9. The Apex court in **Mafatlal Industries Ltd.** (supra) observed that the Central Excise Act and the Rules made thereunder including Section 11B too constitute "law" within the meaning of Article 265 and that in the face of the said provisions – which are exclusive in their nature" no claim for refund is maintainable except and in accordance therewith. The Apex court emphasized that "the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any

collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said Article".

10. Having examined various decided cases and the submissions of both the sides, we are of the considered view that a claim for refund of service tax is governed by the provision of Section 11B for period of limitation. The statutory time limit cannot be extended by any authority as held by the Apex court.

11. Accordingly, the appeal file is return to the referral Bench for a final decision as per the above findings.

(Order pronounced in the open court on __/03/2018.)

(Justice Dr. Satish Chandra)
President

(Ashok Jindal)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Per : Ashok Jindal :

Respectfully I have gone through the views expressed by My Brother Shri B. Ravichandran, Hon'ble Member (Technical) which has been endorsed by Justice (Dr.) Satish Chandra, Hon'ble President.

2. I am having certain reservations on the opinion expressed. The undisputed facts are that, in terms of Notification No. **13/2003-ST dated 20.06.2003**, no tax was payable by the appellants and it has been observed that in various cases, the Hon'ble High Courts and the Hon'ble Apex Court has held that refund of money paid without applying the provisions of limitation under Section 11B, that the amount collected has no sanctity of law as the same is not a duty or a tax and accordingly, the same should be returned to the party. It was also observed that the Hon'ble High Courts and Hon'ble Apex Court have exercises powers under constitution in Writ jurisdiction. Therefore, my Brother entertained view that decision in *Monnet International Limited (supra)* has no applicability to decide the present dispute.

3. I find that in the case of *Parijat Construction vs. CCE, Nashik – 2018 (359) ELT 113 (Bom.)*, the Hon'ble Bombay High Court has examined the issue in hand in Central Excise Appeal No. 306/2016, which has been decided on 13.10.2017, wherein the facts of the case are as under:-

> **"2.** The appellant is engaged in providing "Commercial or Industrial Construction" service and are registered as a service provider under that category. The appellant had during the period May 2006 to November 2007 secured a contract from Mumbai Educational Trust for construction of administration and Core Course building. The appellant being under the *bona fide* belief that the transaction

attracts Service Tax paid the same without collecting the same from the customer and deposited it to the credit of the Central Government. The appellant filed a refund claim on 11th March, 2008 for Rs. 12,62,900/-. The refund claim was filed as the appellant had provided construction services for use of organisation or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for purposes of profit and were thus exempted as per the departmental clarification issued under para 13.2 of C.B.E. & C. Circular No. 80/10/2004-S.T., dated 17th September 2004. A show cause notice dated 30th May, 2008 issued to the appellant by the Assistant Commissioner to show cause as to why the appellant’s claim for refund shall not be rejected. The appellant filed a detailed reply to the show cause notice. The Assistant Commissioner vide Order-in-Original No. 05/ST(R)/2009, dated 31st March, 2009 rejected the refund claim for Rs. 9,73,292/- filed by the appellant as not been sustainable on account of the refund claim being time barred under the provisions of Section 11B of the Central Excise Act, 1944. The refund claim of Rs. 2,89,608/- was allowed. The appellant being aggrieved and dissatisfied with the said orders filed appeal before the Commissioner of Central Excise (Appeals), Nashik. By Order-in-Appeal dated 18th November, 2009, the Commissioner (Appeals) partly allowed the appeals of the appellant to the extent of Rs. 73,330/- and for the remaining amounts the Orders-in-Original were upheld. The appellant filed appeal before the Appellate Tribunal challenging the said order of the Commissioner (Appeals). By the impugned order dated 5th May, 2016, the Appellate Tribunal dismissed the appeal filed by the appellant. Hence the present appeal has been filed.**”**

The Hon'ble High Court has observed as under:-

“5. We are of the view that the issue as to whether limitation prescribed under Section 11B of the said Act applies to a refund claimed in respect of service tax paid under a mistake of law is no longer *res integra.* The two decisions of the Division Bench of this Court in *Hindustan Cocoa* (supra) and *Commissioner of Central Excise, Nagpur* v. *M/s. SGR Infratech Ltd.* (supra) are squarely applicable to the facts of the present case.

6. Both decisions have held the limitation prescribed under Section 11B of the said Act to be not applicable to refund claims for service tax paid under a mistake of law. The decision of the Supreme Court in the case of *Collector of C.E., Chandigarh* v. *Doaba Co-Operative Sugar Mills* (supra) relied upon by the Appellate Tribunal has in applying Section 11B, limitation made an exception in case of refund claims where the payment of duty was under a mistake of law. We are of the view that the impugned order is erroneous in that it applies the limitation prescribed under Section 11B of the Act to the present case were admittedly appellant had paid a Service Tax on Commercial or Industrial Construction Service even though such service is not leviable to service tax. We are of the view that the decisions relied upon by the Appellate Tribunal do not support the

> case of the respondent in rejecting the refund claim on the ground that it was barred by limitation. We are, therefore, of the view that the impugned order is unsustainable.
>
> **7.** We accordingly allow the present appeals and quash and set aside the impugned order, insofar as it is against the appellant in both appeals. We fully allow refund of Rs. 8,99,962/- preferred by the appellant. We direct that the respondent shall refund the amount of Rs. 8,99,962/- to the appellant within a period of three months. There shall be no order as to costs.**"**

4. I further find that, similar view was entertained by Hon'ble High Court of Bombay in the case of ***CCE, Nagpur vs. SGR Infratech Limited*** *in* Central Excise Appeal No. 26/2014 dated 28.10.2015. As the Hon'ble High Court of Bombay has entertained the refund claim in Central Excise Appeals but not exercising Writ jurisdiction power granted to the Hon'ble High Court under Constitution of India and allowed the refund claim holding that time limit prescribed under Section 11B of the Act is not applicable and the decision of Hon'ble Bombay High Court in Central Excise Appeals is binding on this Tribunal. Therefore, in my considered view, for entertaining the refund claim of amount paid by mistake, the time limit prescribed under Section 11B of the Act is not applicable.

Ashok Jindal

Member(Judicial)

In view of the decision by majority as recorded, time limit prescribed under Section 11B of the Central Excise Act, 1944 will govern claim for refund of service tax.

2. The appeal file is returned to referral Bench for a final decision in view of the above findings.

(order pronounced in the court on 27.03.2018)

(Justice Dr. Satish Chandra)
President

(Ashok Jindal)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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