CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
SCO 147-148, SECTOR 17-C, CHANDIGARH-160017

SINGLE MEMBER BENCH
Court-II
Appeal No.ST/60725/2018-ST

(Arising out of OIA No.ST/PKL/290/2017-18 dt.31.1.2018 passed by the CCE(Appeals), Panchkula)

Date of hearing/Decision:24.08.2018

Bharat Bhushan Gupta & Co. **Appellant**

Vs.
Commissioner of GST, Panchkula **Respondent**

Present for the Appellant: Shri Vikash Bansal, CA
Present for the Respondent: Shri G.M.Sharma, AR

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

FINAL ORDER NO.62857/2018

PER: DEVENDER SINGH

The facts of the case are that the appellant were awarded three works contracts by Housing Board, Haryana (HBH) for construction of flats for BPL category in Housing Board Colony, at different locations. The HBH deducted service tax @ 2.472 % (50% of the applicable rate) approximately amounting to Rs.87.36 Lacs from running bills of the appellants on the amount of gross work executed by them after 01.07.2012. Aggrieved by the action of HBH, the appellants filed writ petition vide CWP No.12304 of 2015 before Hon'ble Punjab & Haryana High Court where the High Court vide Order dated 11.08.2016 held that as the HBH is government authority having been set up under a State Act and is wholly controlled by the State Government, the services provided to it were exempted. Consequent to the judgment of Hon'ble High Court, HBH refunded them the sum of Rs.61,80,073/- in

January, 2017. However, the HBH did not refund them the amount of Rs.25,60,293/- being deposit with the Service Tax Department and informed the appellants accordingly. The appellants vide their letter No.2016-17/ST/001 dated 24.01.2017 filed the refund claim of Rs.25,60,293/- with the office of Assistant/Deputy Commissioner of Service Tax, Panchkula. The refund claim of the appellants was returned vide letter dated 31.1.2017 with Deficiency Memo. The appellants again filed the refund claim vide their letter No.2017-18/002 dated 04.05.2017 with the requisite documents. However, the Assistant Commissioner, Central Excise Division, Panchkula vide impugned letter C. No.IV(16) ST/Div.-PKL/Refund/B.B.Gupta/72/PKL/16-17/1181 dated 18.05.2017 returned the refund application along with supporting documents stating as under:-

> "Since M/s. Bharat Bhushan Gupta & Company is not registered with this office and no record/details of the party is available with this office, therefore, this office is unable to process the refund claim.
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> Secondly, you are also not a service receiver in respect of any services provided by any of the assessees in this jurisdiction. So, in any view provisions of Section 11B of Central Excise Act, 1944, as made applicable to Service Tax, you are not eligible for refund from this office."

2. Aggrieved from the letter dt.18.05.2017 issued by Assistant Commissioner, Central Excise Division, Panchkula, the appellant filed the appeal before the Commissioner (Appeals). However, their appeal was rejected on the ground that the appellant had no *locus standi* to file refund claim as service tax has been paid by the Housing Board Haryana. Second ground of rejection was that the activity of the appellant was held to be not liable to service tax and

the refund claim has been filed by the appellant on the service tax has been paid by the Housing Board Haryana and not by the appellant directly. It was held that the ultimate customer has to bear the burden of service tax hence it is to be examined whether the incidence of service tax paid by the Housing Board Haryana has to be passed on to the customer or not which can be done only when the refund claim is filed by the Housing Board Haryana and not by the present appellant. On these grounds, the appeal was rejected. Aggrieved from the same, the appellant have filed this appeal.

3. Ld. CA for the appellant submits that after 1.7.2012 certain contracts were awarded to them by Housing Board Haryana, who deducted 50% of the applicable rate under reverse charge mechanism on the running bills of the contractor and the balance 50% of the applicable rate was paid by the appellant. Hon'ble High Court of Punjab and Haryana in the case of Bharat Bhushan Gupta & Co. vs. State of Haryana and others in its judgment dt.11.8.2018 held that no service tax was leviable on reverse charge basis by the Housing Board Haryana and direction of Housing Board in deducting part of Service Tax was declared to be illegal. He submits that as the service tax has been deducted illegally by the Housing Board Haryana and deposited with the Service Tax Department, they were eligible to file refund claim. In this regard, he relied on the judgment of the Hon'ble Supreme Court in the case of Oswal Chemicals & Fertilizers Ltd. in its judgment dt.30.3.2015 in Civil Appeal No.2807 of 2004. He also submits that the Housing Board Haryana had issued disclaimer certificate dt.30.1.2018 in which the Housing Board Haryana has given its no objection to refund of

service tax to the appellant and has stated that Housing Board will not make any claim for this amount at any time. Ld. CA submits that based on disclaimer certificate, the Commissioner (Appeals) has given relief to other contractors, who were similarly placed vis-a-vis Housing Board Haryana. In support of this, he has placed reliance on the Order-in-Appeal No.Appl/PKL/ST/32/2017-18 dt.22.2.2018. He also placed on record a copy of the refund order passed by the Deputy Commissioner, Central Excise Division, Ambala, in which the claim was initially rejected by the adjudicating authority. Ld. CA also placed on record page 151 of Central Excise Manual wherein it is specified that refund can be filed by the assessee or even a person, who has borne the duty incidence.

4. Ld. AR reiterated the findings in the impugned order of the Commissioner (Appeals).

5. Heard both sides and perused the record.

6. I find that the first issue is whether the appellant have *locus standi* to file refund claim or not. I find that this issue is already settled by the judgment of the Hon'ble Supreme Court in the case of Oswal Chemicals & Fertilizers Ltd. (supra), wherein the Hon'ble Supreme Court has held as below:-

> ***"5.****Insofar as dismissing the application on the ground that the appellant did not have locus standi, we find that view taken by the authorities below is clearly erroneous in law. Section 11B of the Act which contains the provision for making a claim for refund of duty uses the expression "any person" who is eligible to claim refund of the duty. The relevant portion of Section 11B reads as under :*
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> *"****Section 11B. Claim for refund of duty.*** *- (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months 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 (including the documents referred to in Section 12A) as the applicant may*

furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :

Provided further that the limitation of six months shall not apply where any duty has been paid under protest."

6.*The said provision is made for obvious reasons. Though the duty under Section 11B of the Act is payable by the manufacturer, a manufacturer would generally pass on the burden of the excise duty to the buyer or it may be some other person. It is for this reason, a person who is ultimately aggrieved with the payment of the said duty and challenges the order successfully can seek the refund. This becomes apparent from the reading of clause (e) to Explanation (B) appended to the aforesaid provision which is as under :*

"Explanation. - For the purposes of this section, -

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(B) "relevant date" means, -

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in the case of a person, other than the manufacturer, the (e) date of purchase of the goods by such person;

……………………………………."

7.*Explanation (B) defines "relevant date". Though this date has reference to the calculation of limitation period for the purposes of seeking refund of the duty under the aforesaid provision. However, clause (e) while stating the "relevant date" clarifies that in case of a person, other than the manufacturer, the date of purchase of goods by other person would be the relevant date. This itself indicates that the person can be other than the manufacturer and Explanation (B) caters to such other person. It is not even necessary to embark on detailed discussion on this aspect inasmuch as we note that the Constitution Bench of this Court in 'Mafatlal Industries Ltd. and others v. Union of India and others' [1997 (5) SCC 536 = 1997 (89) E.L.T. 247 (S.C.)] has already settled this aspect in the following words :-*

"(xii) Section 11-B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It,

therefore, cannot be said that Section 11-B is a device to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962."

8.*We are, therefore, of the opinion that the appellant who had paid the excise duty to the manufacturer, viz., M/s. Indian Oil Corporation Ltd. (hereinafter referred to as 'IOCL') and BPCL in the instant case, had the necessary locus standi to file the application claiming the refund of the duty."*

7. In view of the above judgment of Hon'ble Supreme Court, I hold that the appellant have locus standi to file refund claim in this case. I also find that the department has entertained the refund claim of another similarly placed contractor, as is evident from the Order-in-Appeal No.Appl/PKL/ST/32/2017-18 dt.22.2.2018 of the Commissioner (Appeals) in the case of Satish Kumar Gupta, Contractor. Hence, the rejection of plea of appellant on this ground by Commissioner (Appeals) is untenable.

8. The second issue pertains to merits of the case where HBH has given the disclaimer certificate. I find that the appellant have placed on record disclaimer certificate dt.30.1.2018 from the Housing Board Haryana in respect of their claim. The order of the Commissioner (Appeals) in the present case is dated 31.1.2018. Admittedly, the disclaimer certificate was not produced before the Commissioner (Appeals) when the impugned order was passed. It would therefore be appropriate to set aside the impugned order and remand the matter to the first appellate authority so that he can examine the issue afresh by taking into account the disclaimer certificate dt.30.1.2018.

9. Accordingly, the impugned order is set aside and matter is remanded back to the Commissioner (Appeals) with the direction to

consider the disclaimer certificate dt.30.1.2018 issued in favour of the appellant issued by the Housing Board Haryana and to pass a fresh order in accordance with law. Needless to say that the appellant should be given fair opportunity to present their case.

10. The appeal is disposed of by way of remand in above terms.

(operative part of order pronounced in the court)

(DEVENDER SINGH)
MEMBER (TECHNICAL)

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