CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.60113 Of 2021

[Arising out of OIA No. 49/ST/CGST-APPEAL-GURUGRAM/SG/2020-21 dated 26.11.2020 passed by the Commissioner (Appeals) of CGST (Appeals), Gurugram]

M/s Grey Orange India Private Limited : Appellant (s)
Orient Bestech Business Tower, GF, FF & SF Sector-34
Gurugram-122004

Vs

Principal Commissioner, CGST, Gurugram : Respondent (s)
GST Bhavan, Plot No. 36-37, Sector 32, Gurugram
Haryana – 122001

APPEARANCE:
Ms. Krati Singh, Ms. Priyanka Singla, Advocate for the Appellant
Shri H. S. Brar, Authorised Representative for the Respondent

CORAM : HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)

ORDER No. A/60971 / 2021

Date of Hearing:25.11.2021

Date of Decision: 29.12.2021

Per : Mr. Ashok Jindal

The appellant is in appeal against the impugned order wherein their refund claim has been rejected as barred by limitation.

2. The facts of the case are that the appellant is engaged in the manufacture of warehousing automation machinery which is driven by artificial intelligence. It had also rendered associated services to its customers, such as installation and commissioning of the machinery. During the period October 2016 to June 2017, certain purchase orders were raised on the appellant for rendition of above services. Against these purchase orders, the appellant received certain advances,on the
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amount received in advance, the appellant discharged service tax, but, later on, these purchase orders were cancelled, the appellant did not rendered any services against the above said orders. The advance received were refunded on 11.10.2018, 30.01.2018 and advance received of Rs. 1,80,000/- against the purchase order dated 12.05.2015 received in May 2017 was adjusted against the amount to be received in respect of new purchase order dated 18.03.2016. The purchase order in which the amount was adjusted, the services were provided under GST regime, therefore, the appellant initially filed the refund claim of Rs. 29,08,210/- but the subject matter of this appeal is restricted to an amount of Rs. 21,52,489/-. The said refund claim was rejected holding that the same is filed beyond one year of the date of payment of service tax in terms of Section 11B of the Central Excise Act, 1944 and the appellant has also failed to pass the bar of unjust enrichment. The appeal was filed against the said order, the matter was remanded back to the adjudicating authority. In remand, the adjudicating authority again rejected the refund claim holding that the same is barred under Section 11B of the Central Excise Act, 1944 and the appellant has failed to pass the bar of unjust enrichment. The said order was challenged before the Ld. Commissioner (Appeals) who held that the refund claim is barred by limitation, it was also held that as the appellant paid service tax on advances but the services were rendered under GST regime, therefore, it was mandatorily requirement to adjust the service tax amount towards GST liability or seek refund of excess GST paid by the appellant. Against the said order, the appellant is before me.

3. Ld. Counsel appearing on behalf of the appellant submits that the appellant is entitled for refund of service tax paid on services which were not rendered by it. It is submission of the Ld. Counsel that once the purchase orders were cancelled, the agreement to provide service also comes to an end. Therefore, the appellant does not fall within the ambit of charging provisions of Section 65B(44) of the Finance Act, 1994 as the same has not been satisfied. It is further submitted that the appellant did not carry out any activity for its ccustomers against the cancelled purchase orders and the relation of service provider and service recipient between the appellant and its customers lapsedas a result of cancellation of purchase orders. Lastly, the appellant has not received any consideration as the advances received by it were either refunded in entirety or adjusted against future purchase orders. Therefore, it is the submission of the Ld. Counsel that the appellant has not provided any services, the service tax incorrectly deposited is liable to be refunded. The appellant also relied to Paragraph 2.3.2 of the Education Guide which clarified that once the amount received for provision of service is returned on cancellation of the agreement to provide a service and the service tax has already been paid, then the taxpayer would be entitled to refund.

4. It is further submitted that in terms of Rule 6(3) of the Service Tax Rules, 1994 an assessee may take credit of excess service tax paid by him if he has refunded any payment for not providing the services agreed to be provided. Therefore, the rejection of refund claim is incorrect. The Ld. Counsel relied on the decision of***CCE vs. Pratibha Construction, Engineer. &Contractors (India) P. Ltd., 2011 (2) STR 182 (Tri. - Mumbai)***wherein it was held that the

assessee is entitled to claim refund of service tax paid on advances received when contracts were cancelled. That since the assessee did not provide any services, the amount will be treated as a deposit. She also relied on the decision of ***Nirbhay Developers Pvt. Ltd. vs. CST, 2018 (2) TMI 483 - CESTAT Ahmedabad***. It was also submitted that the claims arising under Rule 6(3) of ServiceTax Rules, 1994 should be disposed of as per Section 142(5) of the Central Goods and Services Tax Act, 2017 which provides that refund of tax paid under the existing law in respect of services not provided, shall be paid in cash.

5. It was further submitted that since the credit is available to appellant in terms of Rule 6(3) of the ServiceTax Rules, Section 142(6)(a) of the CGST Act is also relevant, which provides that such credit shall be refunded in cash provided the test of Section 11B(2) of the Excise Act is satisfied.

6. It was further submitted that the refund claim is not barred by limitation as it is a settled position of law that the amount deposited with the government does not attain the character of a tax in the absence of any liability of assessee. Since Section 11B of the Excise Act provides for refund of any duty/tax/interest, the time limitation contained therein will not apply to the present case. She further relied on the decision of***Lancor Holding Ltd. vs. Commissioner of GST &CE, 2020 (9) TMI 344 - CESTAT Chennai*** to say that when Rule 6(3) of the Service Tax Rules permits the assessee to take credit of excess service tax paid, it loses the characteristics of tax and is merely a deposit. Therefore, the provisions of Section 11B of the Act are not attracted. Further, relied on the decision of ***Natraj & Venkat***

Associates vs. Assistant Commr., ST, 2010 (17) S.T.R. 3 (Mad.) to say that if what was paid cannot be taken to be duty of excise, the bar of limitation under Section 11B (1) of the Act cannot be applied. She also relies on the case of ***CCE&ST vs. M/s MadhviProcon Pvt. Ltd., 2015 (38) S.T.R. 74 (Tri. –Ahmd).***

7. She further submitted that the doctrine of unjust enrichment is not applicable as the purchase orders were cancelled, the appellant refunded/adjusted the entire advance amount received by it, including the service tax element, and therefore, the burden of amount deposited with the government was not passed on to third persons. It was further submitted that the amount of service tax deposited on advances received are held as "Service tax on customer advances". This amount is shown as "Balance with Statutory/Government Authorities" and certified copy of detailed breakdown of "Balances with Government authorities" is also placed on record. Therefore, the amount is shown as recoverable from the Government in the balance sheet itself, this shows that the burden of service tax for which refund has been claimed has not been passed to the customers but was borne by the appellant. To support of this, she relied on the decisions of ***Ind Swift lands Ltd. vs. CCE&ST, 2015 (38) S.T.R. 819 (Tri. - Del.)*** *and* ***CCE vs. Sona Processors (India) Ltd., 2019 (5) TMI 1632 - CESTAT New Delhi***. She also relied on the decision of ***Bajaj Auto Ltd. vs. CCE, 2017 (347) E.L.T. 519 (Tri. - Mumbai)*** and ***CCE vs. M/s Dabur India Ltd., 2014 (304) E.L.T. 321 (All.)***, the appellant has also claimed interest on delayed refund.

8. On the other hand, the Ld. AR strongly opposed the contention of the ld. Counsel who submitted that the appellant has paid the

service tax, the same cannot be treated as deposit where the same was deposited as in terms of Section 66B of the Finance Act, 1994 there is a levy of tax on all services other than those services specified in the negative list, provided or agreed to be provided in the taxable territory and in explanation to Rule3 of Point of Taxation Rules, 2011, a service provider receiving any advances in respect of any services to be provided, was required to pay service tax on the same. As the appellant has discharged their service tax liability on Advances received by them for the services to be provided subsequently as per the said statutory provisions. Therefore, tax so deposited at that instant was "tax" not "deposit". The fact that it became refundable on account of non-provision of services related thereto, which is a point of dispute, would not change its character but only change the appellant's eligibility to seek it back.

9. It is his further submission that after the introduction of GST, two of the appellant's service recipients cancelled three pre-GST era purchase orders and issued fresh purchase orders under GST regime and the services contracted to be provided vide the earlier purchase orders were provided vide Replacement Purchase Orders to the same service recipient. Therefore, the appellant's claim, that they are eligible for refund as the purchase orders were cancelled is hollow. In view of the above fact that services contracted therein were provided, albeit under replacement purchase orders. It is his further submission that initially refund claim was filed against eight purchase orders, but they are reduced to three purchase orders after technical glitches.

10. He further submitted that no evidence of adjustment of advance as there is an ambiguity about the amount of advance received as also about the purchase order against which received.

11. He further submitted that the cancellation of purchase orders not material when replacement purchase orders issued simultaneously, and the appellant was aware about the need to cancel the purchase orders due to technical reasons way back in September 2017. He also submits that the refund being sought on account of their inability to transit the subject amount of GST through Trans-I and the appellant knew before its filing that they would have to claim refund. It is his submission that the refund claim filed under Section 11B has to be processed under the said provisions. He relied on the decision of the Hon'ble Gujarat High Court in the case of ***Ajni Interiors vs.*** **UOI – 2019 (9) TMI 529 (Gujarat High Court)** and heavily relied on the decision of Hon'ble Apex Court in the case of ***Mafatlal Industries Ltd v/s UOI1997 (89) ELT 247 (S.C.)*** wherein it was held that refund application filed beyond period specified under Section 11B of Central Excise Act, 1944 could not be entertained unless refund had arisen as a consequence of declaration of a statutory provision as unconstitutional. He also relied on the decision of Hon'ble Punjab and Haryana High Court in***Sarita Handa Exports Pvt Ltd v/s UOI - 2015 (321) E.L.T. 434 (P & H).*** He further also relied on the decision of the Hon'ble High Court of Madras in the case of ***MGM International Exports Ltd v/s ACST, Chennai – 2021-TIOL-989-HC-MAD-ST***.

12. He further submitted that Rule 6(3) of the Service Tax Rules, 1994 is not applicable to the subject case as the appellant has admitted that they have rendered services in respect of all purchase orders against which they have sought refund.

13. He further submitted that the appellant claim that the limitation should be counted from the date they returned the advances in question. The said claim is incorrect asmuch as the said act is required to cross the bar of unjust enrichment but it does not have any bearing on the issue of limitation which would have to be calculated based on the date of payment of duty in terms of Section 11B. Although, the appellant is entitled for refund of the service tax paid on services which were not rendered by it but the claim shall be governed by the provision of Section 11B of the Act and the refund claim has filed beyond the period of one year from the date of deposit of service tax, therefore, the same is barred by limitation.

14. He further submitted that the refund claim is admissible in terms of Section 142(5) of CGST Act, 2017 clearly provides that any refund claim in respect of service tax in respect of service not provided will be disposed of in accordance with the provisions of the existing law as made applicable to former and Rules framed in terms of former). The appellant itself provides that the refund in cases of service tax paid prior to 30.06.2017 **but no services provided subsequently**, shall be governed by the Act, i.e. Finance Act, 1994. But, in the present case, the Appellant has provided the services post 30.06.2017. Further, under Rule 6(3) also only cases of services not provided are covered, whereas in the subject case services have been provided.

15. He also submitted that the decision in the case of ***CCE, Bangalore v/s KVR Construction 2011 (7) TMI1334 (S.C.)*** the fact of the case is not applicable as in that case refund of service tax paid by mistake was sought refund but there is not the said case.

16. He further submitted that the refund claim is hit by bar of unjust enrichment as the appellant has not attached the attested/verified/certified by anybody, let alone a Chartered Accountant, so is of no evidentiary value as such. Nor are any other documents, most of which are purportedly emails exchanged between employees of the Appellant or them and the service recipients of the employees.

17. He further submitted that the interest under Section 11BB of the Central Excise Act, 1944 would become payable only after the refund is held disbursable as refund itself is not admissible so the question of payment of interest does not arise. Further, even if the refund is held admissible, interest would be payable only after 3 months from the date of filing of application at prescribed rate. Therefore, he prayed that the refund claim is to be rejected.

18. Heard the parties and considered the submissions.

19. The facts of the case which arises out of the arguments and records placed before me are that initially the appellant filed refund claim with regard to eight purchase orders but the same was restricted to three purchase order Nos. PO No. DO11116401dated 23.03.2017, PO No. DO10341814dated 16.08.2016 and PO No.

IRO/May/15-16/009 Dated 12.05.2015. It is a fact on record that all these three purchase orders have been cancelled by the service recipients and the appellant has refunded the advance received against purchase order dated 23.03.2017 on 11.10.2018 alongwith service tax, the amount was refunded alongwith service tax against purchase order number dated 16.08.2016 on 30.01.2018 and against the purchase order dated 12.05.2015 the purchase order and full amount of advance received was adjusted against the purchase order dated 18.03.2016. The appellant is claiming refund of the service tax paid on the advance received against these purchase orders which are subject matter of this appeal.

20. The sole issue arises whether the said refund claim is barred by limitation or not in terms of Section 11B of the Act?

21. For better appreciation of the issue in hand, the provision of Section 11B are required to be examined and which are extracted herein below:-

> ***"Section 11B. Claim for refund of duty and interest, if any, paid on such duty -***
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> *(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy 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 (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :*
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> ***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 one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.*

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided *that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -*

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

Provided *further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.*

Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2). (3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the

Central Government at any time by notification in the Official Gazette. (5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of

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

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

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

(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;

(eb) in case where duty of excise is paid provisionally under this Act or the rules made there under, the date of adjustment of duty after the final assessment thereof;

(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;

in this case, the appellant was required to pay service tax in terms of Rule 3 of Point of Taxation Rules, 2011 on advances received in respect of any services to be provided. The said advances so received is required to be adjusted against the amount of service provided by the appellant. Admitted, in this case, no such service has been provided by the appellant. The service tax paid by the appellant is only a provision for payment of service tax on the services which were to be provided later. Therefore, in terms of Section 11B (5) Explanation B (eb) which provides that in case where the duty of excise is paid provisionally under this Act or the Rules made there under, the date of adjustment of duty after the finalization of assessment thereof is the relevant date.

22. Admittedly, the service tax paid by the appellant was provisionally for the services to be provided later on, but later on, no service has been provided by the appellant and the purchase orders were cancelled.In those circumstances, the amount so paid provisionally is required to be adjusted when the purchase orders were cancelled and the date of which the purchase orders were cancelled is the relevant date for filing the refund claim.

23. From examining the papers, it is clear that the refund claims were required to be filed within one year from the date of cancellation of the purchase orders in terms of Section 11B (5) Explanation B (eb) of the ACT, 1944.

23. From the papers placed before me, it is not coming out whether the said refund claims have filed within one year from the date of cancellation of the purchase orders or not,the same is required to be examined by the adjudicating authority.

24. Further, I find that both sides have relied on various judicial pronouncements, but, in the case of ***Mafatlal Industries (supra)***if any amount is payable by the assessee and have been paid in

accordance with law, the refund of same is governed by Section 11B of the Act. Therefore, the refund claim is required to be filed within one year from the relevant date.

25. In this case, I hold that the relevant date for filing the refund claim is the cancellation of the purchase orders in terms of Section 11B (5) Explanation B (eb) of the Act.

26. If the refund claims are filed within one year from the date of cancellation of the purchase orders, the same shall be entertained as the refund claim are filed in time.

27. The issue of passing the bar of unjust enrichment shall be examined by the adjudicating authority based on documents placed by the appellants.

28. In view of the above observations, I set-aside the impugned order and remand matter back to the adjudicating authority who shall entertain their refund claims as discussed herein above whether the same is barred by limitation or not? Further, whether the bar of unjust enrichment is applicable to the facts of this case or not?

29. In result, the appeal is disposed of by way of remand.

(Pronounced on 29.12.2021)

(Ashok Jindal)
MEMBER (JUDICIAL)

G.Y.