

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO.III

Service Tax Appeal No.53341 of 2018 (SM)

[Arising out of Order-in-Appeal No.246(AG)/CE/JDR/2018 dated 03.05.2018 passed by the Commissioner (Audit), Central Excise and CGST, Jodhpur]

M/s. Dynamic Elecpower Pvt. Ltd.

Appellant

G-68, RIICO Industrial Area, Bility,
Bhilwara (Rajasthan)-311 001.

VERSUS

Commissioner of Central Goods and

Respondent

Service Tax,

142-B, Hiran Magri,

Sector-11,

Udaipur (Rajasthan)-313 001.

APPEARANCE:

Shri Bipin Garg and Ms. J. Kainaat, Advocates for the appellant

Shri Arun Kumar Sheoran, Authorised Representative for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

FINAL ORDER NO. 55446/2024

DATE OF HEARING:19.03.2024

DATE OF DECISION:21.03.2024

BINU TAMTA:

1. The appellant has assailed the order-in-appeal no.246(AG)CE/JDR/2018 dated 03.05.2018 ,whereby the rejection of the refund claim on the ground of unjust enrichment in terms of Section 11 B of the Central Excise Act, 1944 was upheld.

2. The brief facts of the case are that the appellant were engaged in providing services under the category of 'Erection, Commissioning or Installation Services', 'Business Auxiliary Services' and 'Management, Maintenance & Repair Services' to PHED and others during the period 2004-2005 to 2008-2009.

3. A show cause notice dated 14.10.2009 was issued to the appellant for recovery of service tax amounting to Rs.40,56,133/-, which was confirmed by the Adjudicating Authority vide order-in-original dated 18.03.2011 beside interest and also imposed penalty. The appellant filed an appeal and in compliance to the Stay Order dated 28.12.2011 deposited an amount of Rs.16,00,000/-. The Commissioner (Appeals) vide Order-in-Appeal No.143 dated 15.04.2015 confirmed the demand of Rs.12,03,204/- and rest of the demand was set aside. Penalty was also set aside. He observed that the appellant had paid service tax in excess of Rs.7,24,463/-.

4. In view of the Order-in-Appeal dated 15.04.2015, the appellant filed the refund claim of Rs.11,21,259/-. The Adjudicating Authority sanctioned the refund claim of Rs.3,96,786/- to the appellant and the remaining amount of Rs.7,27,463/- was directed to be credited to the Consumer Welfare Fund under Section 11B(2) read with Section 12C of the Central Excise Act on the ground of unjust enrichment under Section 11B of the Act, 1944. The appeal filed by the appellant was rejected by the impugned order and the plea of unjust enrichment was upheld. Being aggrieved, the appellant has filed this appeal before the Tribunal.

5. We have heard Shri Bipin Garg and Ms. J. Kainaat, learned Counsels for the appellant and Shri Arun Kumar Sheoran, Authorised Representative for the respondent/Department.

6. The issue that arises is whether the refund claim of the appellant has been rightly credited to the Consumer Welfare Fund on the ground of unjust enrichment. On perusal of the orders of the Authorities below, I find that the reasons for rejecting is that in terms of Section 11B of the Act, 1944, the appellant was required to submit such documentary or other evidences so as

to establish that the amount of duty and interest, if any, and the incidence of such duty had not been passed on by him to any other person. Further, referring to the provisions of Section 12B of the Act, 1944, which provides that unless the contrary is proved by the assessee, it shall be deemed that the assessee has passed on the full incidence of service tax refund to the service receiver. In terms of the provisions, the applicant was required to submit the necessary documents and evidences in support of his claim that the principle of unjust enrichment would not apply as he has not passed on the incidence of duty to the service receiver. Both, the Adjudicating Authority and the Appellate Authority had specifically noted that either the appellant had not produced the documents or had only submitted the photocopies of the Ledger Account and invoices. In this regard, I would quote the findings of the Adjudicating Authority as under:-

“Further, as regards to the remaining amount, the assessee have only submitted photocopies of Ledger Account and photocopies of invoices issued in respect of M/s. Megha Engineering & Infrastructure Ltd., for the year 2008-09 only and ‘no original invoices/Ledger are produced’ by the assessee. The said invoices shows the month-wise amount charged for the ‘Operational and Maintenance Services’ and against the head of service tax they have shown the amount as zero. Further, no copies of invoices M/s. PMC Chury, M/s. Batemann Engineering (Project), M/s. Secretariat, Jaipur and PHED, Bhilwara were produced so as to establish that the burden of service tax has not been passed on by them to any other person. I also notice that as per para 16 of order-in-appeal 143(SLM)ST/JPR/2015 dated 24/04/2015 the assessee’s claim was accepted that the total amount received by them against the services provided by them is treated as cum tax in terms of Section 67(2) of the Finance Act, 1994 and the calculation for arriving at the tax liability was made accordingly. This shows that the assessee has received the consideration for the services provided are inclusive of the service tax element. In view of this, the excess paid service tax claimed by the assessee are inbuilt in the amount charged and received for the period 2008-2009 in respect of M/s. Megha Engineering & Infrastructure Ltd. and the assessee have collected the amount of service tax being claimed as refund now.”

7. The refund claim filed by the appellant includes the amount of Rs.7,24,463/- excess paid under the category of 'Management, Maintenance & Repair Services'. As the refund claim is found to be hit by unjust enrichment clause for want of requisite documents, I feel that an opportunity may be granted to the appellant to produce the documents and other evidences proving that the incidence of duty has not been passed on either directly or indirectly to the service receiver. The matter is remanded to the Adjudicating Authority, granting liberty to the appellant to substantiate that the claim is not hit by unjust enrichment in the light of the documents produced.

8. The appeal, is allowed by way of remand.

[Order pronounced on 21st March,2024]

(Binu Tamta)
Member (Judicial)

Ckp.