CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH- COURT NO. I

Service Tax Appeal No. 51004 of 2018

(Arising out of Order-in-Appeal No. 12/ST/DLH/2018 dated 01.02.2018 passed by the Commissioner (Appeals-I) , Central Tax/ GST, Delhi.)

M/s Tirath Ram Ahuja Private Limited **...Appellant**
B-II/50 Mohan Cooperative Industrial Estate,
Badarpur,
New Delhi-110049

Versus

The Commissioner, Central Tax/GST **...Respondent**
Central Revenue Building,
I.P. Estate, New Delhi

APPEARANCE:

Shri Srinivas Kotni and Shri Akshay Kumar, Advocates for the Appellant
Shri Manoj Kumar, Authorized Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: May 01, 2024

FINAL ORDER NO. 55783/2024

JUSTICE DILIP GUPTA

The order dated 01.02.2018 passed by the Commissioner (Appeals), Central Tax/GST Delhi[1] upholding the order dated 28.12.2016 passed by the Assistant Commissioner of Service Tax sanctioning the refund claim of Rs. 1,23,70,024/- but crediting it to the Consumer Welfare Fund has been assailed in this appeal filed by M/s Tirath Ram Ahuja Private Limited[2].

2. The appellant is engaged in construction business. During the period from June, 2005 to September 2006, the appellant was awarded

1. the Commissioner (Appeals)
2. the appellant

contracts by Unitech and Vatika relating to the execution of their projects but cement and steel was supplied by Unitech and Vatika to the appellant free of cost. On receipt of a certificate regarding cement and steel supplied free of cost, the appellant raised supplementary invoices on Unitech and Vatika on the supply of cement and charged service tax by way of abundant precaution as according to the appellant service tax was not leviable on the material supplied free of cost. On receipt of the invoices from the appellant, both Unitech and Vatika paid service tax, which the appellant deposited with the service tax department.

3. A show cause notice dated March 07, 2007 was served upon the appellant requiring the appellant to show cause why service tax amount of Rs. 1,23,70,024/- paid by the appellant on the value of steel and cement supplied to the appellant free of cost should not be appropriated against the service tax liability. The appellant filed a reply and denied the allegations but by an order dated March 23, 2009 the Commissioner of Central Excise confirmed the demand.

4. Feeling aggrieved, the appellant filed an appeal before the Tribunal and the Tribunal by order dated 23.07.2014 allowed the appeal. The order is reproduced below:

> " The assessee is in appeal against the adjudication order dated 23.3.2009 passed by the Commissioner, Central Excise (Adjudication), New Delhi. This order confirmed the service tax demand of Rs.1,23,70,024/-, apart from interest liability while appropriating the assessed amount of service tax already deposited prior to the conclusion of the proceedings, on the ground that the appellant/assessee was disentitled to avail the benefits of exemption Notification Nos.15/2004-ST and 18/2005-ST dated 10.9.2004 and 7.6.2005, respectively since the assessee failed to disclose the value of goods supplied free of cost by the service recipient to the assessee for incorporation into works executed by the assessee for the benefit of the recipients.

> 2. This issue is squarely covered by the decision of the Larger Bench of this Tribunal in **Bhayana Builders Pvt. Ltd. vs. C.S.T., New Delhi** - 2013 (32) STR 49 (Tri-LB). This is only the issue on the basis of which liability of the assessee to tax and interest, penalty was determined by the impugned adjudication order.
>
> 3. In the circumstances, the appeal is allowed. The impugned order dated 23.3.2009 passed by the Commissioner of Central Excise (Adjudication), New Delhi is quashed. The appellant shall be entitled to refund of the amount deposited pursuant to the proceedings which culminated into the impugned order, subject to verification of unjust enrichment, if any."

5. Pursuant to the aforesaid order passed by the Tribunal, the appellant submitted a letter dated 06.08.2014 to the Commissioner of Service Tax, Delhi for refund of Rs. 1,23,70,024/- but the appellant was asked to file the refund claim before the appropriate authority, namely the Assistant/Deputy Commissioner of Service Tax. Accordingly, the appellant sent a communication dated 19.08.2014 to the Assistant/Deputy Commissioner of Service Tax, New Delhi by speed post. The contents of the application are reproduced below:

> "Asstt./Dy.Comrhissioner of Service-tax,
> Division-II, Block No.11,
> 7^{th} Floor, CGO Complex, Lodhi Road,
> New Delhi.
>
> Sub: Request for issue of refund of Rs. 1,23,70,024/-
>
> Dear Sir,
>
> We had requested the Commissioner of Service Tax IP Estate, New Delhi vide our letter No.TRA/HO/14/339 dated 06.08.2014 for the refund of Rs.1,23,70,024/- being the refund due as has been held by the Hon'ble CESTAT vide Final Order No.ST/A/52894/2014-CU[DB] dated 23.07.2014, copy enclosed. The Office of the Commissioner of Service tax 17-B, I.P.Estate, IAEA House, New Delhi vide their letter No. C. No. IV(16) HQ /ST /Tech /95/Misc/2014/ 18673 dated 13.08.2014 have directed us to get in touch with you, the appropriate authority, for the issue of the refund of Rs. 1,23,70,024/- as held per order dated 23.07.2014 of the Hon'ble CESTAT, the copy of the letter No. C. No. IV (16) HQ /ST /Tech/ 95/ Misc / 2014 Misc/ 2014/18673 dated 13.08.2014 enclosed for your ready reference.

> We would be grateful if the refund of Rs. 1,23,70,024/-may kindly be issued at the earliest."

6. On receipt of the application, the Superintendent (Refund) sent a letter dated 25.08.2014 to the appellant pointing out why the said letter cannot be treated as a refund application. The reasons stated are as follows:

> 1. Application as per section 11B of Central Excise Act, 1944 read with section 83 of Finance Act, 1994.
> 2. On Line Refund Request is not submitted.
> 3. Certified copy of the ST-2 Certificate.
> 4. ST-3 return for the relevant period with challan deposited.
> 5. Certificate from your Statutory Auditor certifying that the burden of Service Tax, which is claimed as refund, has not been passed on to any other person.
> 6. Certified copy of the Balance Sheet of the relevant period alongwith all the Schedules, clearly reflecting the claimed amount of ₹1,23,70,024/- as 'Service Tax Recoverable'.
> 7. Other supporting documents to sustain your refund claim.

7. The appellant sent a reply dated 02.09.2014 to the aforesaid letter of the Superintendent and stated:

> "Dear Sir,
>
> This has reference to your letter dated 25-08-2014 referred to above received on 28-08-2014. We are enclosing the desired information / documents are requested that the refund be issued at the earliest.
>
> 1. Application in Form-R Triplicate as per section 11B of Central Excise Act, 1944 read with section 83 of Finance Act 1944.
>
> 2. The refund application has been submitted online on 29-08-2014.
>
> 3. Certified copy of ST-2 Certificate.

> 4. Copies of ST-3 return for the period April /September 2006 & October/March 2007 alongwith copies of challan highlighting on the return & challan the amount deposited.
>
> 5. Certificate from the statutory Auditors.
>
> 6. Copy of the Balance Sheet for the F.Y. 2006-2007 during which the Service Tax Rs. 1,23,70,024/- was required to be paid by us on FOC material as per interpretation of the rules of valuation of taxable services by the department and upheld by the commissioner of service tax (Adjudication) on appeal filed by the Company.
>
> The sum of Rs 1,23,70,024 paid as service tax on FOC material held to be refundable by the Hon'ble CESTAT vide order dated 23-07-2014 and the same has been reflected as " Service Tax Receivable - Refund Due" in the books of Accounts."

8. The Assistant Commissioner, by order dated 28.12.2016, sanctioned the refund claim of Rs. 1,23,70,024/-, but ordered it to be credited to the Consumer Welfare Fund for the reason that the grant of refund to the appellant would unjustly enrich the appellant. The relevant portion of the order passed by the Assistant Commissioner is reproduced below:

> "I have carefully gone through the facts of the case, the contention of the party and the provisions contained in Section 11B of the Central Excise Act, 1944, as made applicable to Service Tax. I find that the said payments were made after raising the invoices upon the parties and recovering Service Tax from the said parties. I have carefully gone through the facts of the case, the contention of the party and the provisions contained in Section 11B of the Central Excise Act, 1944, as made applicable to Service Tax. I find that the said payments were made after raising the invoices upon the parties and recovering Service Tax from the said parties. **However, the claimant has stated that they have credited their clients with the amount of Service Tax, claimed as refund. The claimant had recovered the said amount of Service Tax from their clients in the year 2006-07. Their clients are not individual consumers but**

> **Real Estate Developers. There is no evidence adduced to show that the said clients of claimant had not passed on the burden of said Service Tax on their customers, directly or indirectly. In such situation, I find that the grant of refund to the claimant will certainly amount to 'unjust enrichment' in terms of Section 11B of the Central Excise Act, 1944."**
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> **(emphasis supplied)**

9. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals) upheld the order passed by the Assistant Commissioner for the following reasons:

> 9. The appellants had received the said amount of service tax from their clients i.e. Unitech & Vatika for the concerned period after raising invoices. Appellants contented that their clients had been given credit of the service tax paid and the amount would be transferred to their clients when they would get the refund from the department, and, therefore, there was no Unjust Enrichment. However, it can be seen that by collecting service tax from clients, the appellants get unjustly enriched if they receive the refund.
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> 10. **Further, the clients of Appellants are Real Estate developers who are engaged in sale of built up residential/ commercial units to its customers/consumers. There is no evidence to show that the clients had not passed on the burden of the service tax to their final consumers in any case. Appellants had provided services to these Real Estate developers who in turn recovered entire cost, taxes, duties and profits from each individual buyer of built up units. If an entity has been charged service tax by it supplier, it is clear that it has passed on the burden to its customers and already recovered amount representing tax from its customers. In such case the refund of Service Tax paid to the input stage service provider/ supplier will amount to excess end undeserved profit, and hence 'unjust enrichment' under section 11B of Central Excise Act, 1944 which provides – xxxxxxxxx**

Section 11B. Claim for refund of duty and interest, if any, paid on such duty-

(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:

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 -

(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;

Refund of duty, therefore, should be paid to the customers who have ultimately borne the burden of tax. And since it is practically not feasible to identify such customers on individual basis, such refund has to be credited to Consumer Welfare Fund.

10. Shri Srinivas Kotni assisted by Shri Akshay Kumar, learned counsel for the appellant submitted that the Commissioner (Appeals) committed an error in ordering the amount sanctioned to be deposited in the Consumer Welfare Fund. Learned counsel pointed out that though the appellant may have initially collected the service tax from Unitech and Vatika, but after the order was passed by the Tribunal the

appellant issued a Credit Note in favor of Unitech and Vatika. It is, therefore, the contention of the learned counsel for the appellant that the burden of service tax was borne by the appellant and in terms of the directions issued by the Tribunal, the appellant was entitled to refund since it would not be a case of unjust enrichment if the amount was refunded to the appellant. To support the contention that the issuance of Credit Note would mean that the appellant would not be unjustly enriched, learned counsel placed reliance upon the decision of the Supreme Court in **Sunrays Engineers Pvt Ltd** vs**. Commissioner of Central Excise, Jaipur**[3] and the decision of the Karnataka High court in **Commissioner of Service Tax, Bangalore** vs. **Shiva Analyticals (I) Ltd**. Learned counsel also placed reliance upon a decision of a learned Member of the Tribunal in **M/s Jalan Con Cast Ltd.** vs. **Commissioner of Central GST & Central Excise, Varanasi, Allahabad**[4].

11. Shri Manoj Kumar, learned authorized representative appearing for the department has however supported the impugned order and submitted that it does not call for any interference in this appeal.

12. The submissions advanced by learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

13. In the order dated 23.07.2014, the Tribunal while allowing the appeal filed by the appellant specifically made it clear that the appellant would be entitled to refund of the amount deposited pursuant to the proceedings which culminated in the impugned order subject to

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3 . **2015 (318)E.L.T. 583 (S.C.)**
4. **Excise Appeal No. 70696 of 2021 decided on January 12,2024**

verification of unjust enrichment, if any. It was, therefore, incumbent upon the appellant, while claiming refund, to establish by supporting documents that refund of the amount would not unjustly enrich the appellant.

14. The letter dated 19.08.2014 that was sent by the appellant to the Assistant/Deputy Commissioner of Service Tax merely states that the appellant is entitled to refund of Rs. 1,23,70,024/- in terms of the order passed by the Tribunal. There is no averment, much less any proof in support thereof, that the appellant would not unjustly enrich itself if the amount is refunded. Though the Superintendent had sent a letter dated 25.08.2014 to the appellant to justify its claim of refund, the appellant merely annexed a Certificate of a Chartered Accountant which certified that the appellant had not passed the burden of service tax of Rs. 1,23,70,024/- claimed as refund to any other party. The appellant made no reference to the Credit Note that contained a stipulation that the amount would actually be paid to Unitech and Vatika only when the department refunds the amount to the appellant. The certificate does not even specify why the appellant would not unjustly enriched.

15. In any view of the matter, even if it is assumed that such credit was done by the appellant in the books of accounts in favour of Unitech and Vatika, there is nothing on the record even in this appeal to substantiate that Unitech and Vatika had not collected service tax from the allottees to whom they had allotted the flats. This is what prevailed upon the Assistant/Deputy Commissioner to hold that refund should be credited in the Consumer Welfare Fund. Once such a finding was recorded by the Assistant Commissioner, it was incumbent upon the appellant to have at least filed sufficient evidence before the

Commissioner (Appeals) to substantiate that these two builders had not recovered service tax from the allottees.

16. There is no error in the Assistant Commissioner assuming, in the absence of any evidence led by the appellant, that the two builders had recovered service tax from the allottees of the flats and so they would be unjustly enriched even if the amount of service tax was paid by the appellant to the two builders after refund from the department.

17. Learned counsel for the appellant has placed reliance upon the decision of the Supreme Court in **Sunrays Engineers Pvt Ltd**. In paragraph 3 of the judgment, the Supreme Court noticed that before the Commissioner (Appeals) evidence was produced by the appellant to show that the burden was not passed as the credit of the excess amount was given to the two public sector undertakings. In the instant case, as noticed above, no evidence has been led by the appellant to substantiate that the amount was actually paid to Unitech and Vatika. Even according to the appellant, it had made entries in the books of account and the appellant would actually pay the amount to Unitech and Vatika only when the department would refund the amount to the appellant. Thus, it is a clear case where the amount of service tax recovered by the appellant from Unitech and Vatika was not actually paid to Unitech and Vatika and only an assurance was given to them that the amount would be paid upon receipt of the refund amount from the Government. In any view of the matter, even if it is assumed that there was a credit by the appellant in favour of Unitech and Vatika, there is nothing on the record to indicate that Unitech and Vatika had not recovered service tax from the allottees.

18. Learned counsel for the appellant also placed reliance upon a decision of the Tribunal in **M/s Jalan Con Cast Ltd.** The issue that was examined was whether the bar of limitation contemplated under section 11B of the Central Excise Act, 1944 would be applicable.

19. In the present case, the Tribunal while allowing the appeal filed by the appellant had made it absolutely clear that the appellant would be entitled to refund only if the appellant established that it would not be unjustly enriched. This order of the Tribunal has attained finality. In such circumstances, it is not open to the appellant to not now contend that the principles of unjust enrichment should not have been examined by the Adjudicating Authority.

20. Thus for all the reasons stated above, there is no error in the order passed by the Commissioner (Appeals). The appeal is, accordingly, dismissed.

(Order dictated in the Open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Shenaj, Jyoti