

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

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal Nos. 57493 & 57494 of 2013

(Arising out of order-in-appeal No. 40/ST/DLH/2013 & 41/ST/DLH/2013 both dated 18.02.2013 passed by the Commissioner of Central Excise (Appeals), New Delhi)

DATE OF HEARING : 16.02.2017

DATE OF DECISION : 08.03.2017

M/s Monnet International Ltd. Appellants
M/s Monnet Projects India Pvt. Ltd. (Rep by Ms. Vibha Narang, Adv)

VERSUS

CCE, New Delhi Respondent
(Rep. by Sh. Ranjan Khanna, DR)

CORAM : HON'BLE MR. JUSTICE (DR.) SATISH CHANDRA, PRESIDENT
HON'BLE MR. V. PADMANABHAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 52170-52171/2017

PER V. PADMANABHAN:

Both the appeals have been filed by the assessee-Appellants against the order-in-appeal 40/ST/DLH/2013 & 41/ST/DLH/2013 dated 18.02.2013 passed by the Commissioner of Central Excise (Appeals), New Delhi. Since the issue in both the appeals is identical, so they are disposed of by this common order for the sake of brevity.

2. The brief facts of the case are that the assessee-Appellants were registered with the Service Tax Department for providing the "Business Auxiliary Service" under Section 65 of the Finance Act, 1994 and during the period under consideration (01.06.2005 to 31.01.2007), were providing liaisoning services to M/s Dongfang Electric Corporation, China (hereinafter referred to as "**DEC**"). It is alleged that under the pressure/ignorance, the assessee-Appellants have deposited the amount of Rs. 93,13,142/- in the first case and Rs. 25,31,125/- in the second case in instalments towards Service Tax. After knowing the fact that, during the period under consideration, the 'Liaisoning Services' provided by them were not subject to Service Tax, a refund claim was filed in Form-R on 02.01.2008 along with the certificate of the Chartered Accountant. The refund claim was rejected by the lower authorities being time-barred as per Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. Being aggrieved, the assessee-Appellants have filed the present appeals.

3. With this background, we have heard Ms. Vibha Garg, learned counsel for the assessee-Appellants and Shri Ranjan Khanna, learned DR for the Department.

4. Ms. Vibha Garg, learned counsel, at the strength of the written submission, submits that during the period under consideration, the 'Liaisoning Service' provided by the assessee-Appellants were not subject to any Service Tax. Thus, the deposited amount is not towards a tax but it is merely a deposit which was wrongly made. Hence, Section 11B of the Central Excise Act, 1944 is not applicable in the instant case. There is no

unjust enrichment, as the amount was deposited from own pocket of the assessee-Appellants. She also submits that on the principle of natural justice, the amount retained by the Department is the violation of Article 265 of the Constitution of India. For the purpose, she relied upon the ratio laid down in the case of **Mera Baba Realty Associate (P) Ltd. vs Commissioner of Service Tax, Delhi**, 2016-TIOL-2139-HC-DEL-ST, wherein it was observed that once it is admitted that the collection of the amount was without authority of law, then it falls beyond the imprint of expression or expropriation under pretence of authority of law. The limit of **one year** prescribed by Section 11B(1) of the Central Excise Act, 1944 would not apply and refund is admissible. To support her arguments, she also relied upon the ratio laid down in the following case laws :

- (i) **M/s Kalpataru Power Transmission Ltd. vs CCE&ST, Ahmedabad**, 2015 (11) TMI 911 – CESTAT Ahmedabad;
- (ii) **Commissioner of Central Excise (Appeals), Bangalore vs KVR Construction**, 2012 (26) STR 195 (Kar.);
- (iii) **Commissioner of Central Excise, Bangalore-III vs Motorola India Pvt. Ltd.**, 2008 (11) STR 555 (Kar.);
- (iv) **Manibhai & Brothers vs Commissioner of Central Excise & Service Tax, Vadodara**, 2016 (337) ELT 607 (Tri.-Ahmd.);

(v) **Union of India vs ITC Ltd.**, 1993 (67) ELT 3 (SC);
and

(vi) **Hind Agro Industries Ltd. vs Commissioner of Customs**, 2008 (221) ELT 336 (Del.)

Lastly, she submits that the refund of the deposit may kindly be allowed.

5. On the other hand, Shri Ranjan Khanna, learned Department Representative, submits that Section 11B of the Central Excise Act, 1944 is prescribing a time limit of **one year** for claiming refund. Hence, the refund claim is time barred. He also drawn our attention to the impugned order (para 8) wherein it is clearly mentioned that the assessee-Appellants have not provided the copy of the agreement dated 24th March, 2005 entered with DEC, China. He also relied upon the ratio laid down in the case of **Miles India Ltd. vs Assistant Collector of Customs**, 1987 (30) ELT 641 (SC); and **Collector of Central Excise, Chandigarh vs Boaba Co-operative Sugar Mills**, 1988 (37) ELT 478 (SC), wherein the refund claim was denied beyond the time limit of **one year**.

6. After hearing both sides at length and on perusal of record, it appears that during the period under consideration, the assessee-Appellants had provided the 'Liaisoning Services', which were not subject to Service Tax as per the Finance Act, 1994. The assessee-Appellants by mistake or in good faith or pressure from

the Department had deposited the amounts towards Service Tax on different dates as per the details mentioned in the impugned orders. Soon after knowing the factual position, the assessee-Appellants have filed the refund claim along with the certificate issued by the Chartered Accountant in prescribed Form. The necessary details like registration certificate, ST-3 for concerned periods, copy of the challan, copy of Cenvat Credit register, copy of CA certificate were also enclosed. The claim of refund was rejected by the lower authorities in a mechanical way by following the statutory provisions prescribed under Section 11B of the Central Excise Act, 1944.

7. During the course of argument, the learned counsel for the assessee-Appellants has drawn our attention to the affidavit filed by the Director of the assessee-Appellants' Company wherein it was deposed that the Service Tax was paid by them under the misconception of law from their own pocket. As per the certificate issued by the Chartered Accountant, no Service Tax was charged in the invoice raised on DEC, China. Apart from the amount raised in the invoice, the assessee-Appellants has not received any amount from DEC, China, as Service Tax. A certificate was also issued by Dongfang Electronic Corporation on 31.08.2010 where it is clearly mentioned that no Service Tax was paid to the assessee-Appellants.

8. From these documents, it is crystal clear that DEC, China has not paid any Service Tax. The Service Tax was paid by the assessee-Appellants from their own pocket under the misconception of law or by mistake or in good faith. When it is so, then no case of unjust enrichment is made out.

9. In the case of **Hind Agro Industries Ltd.** (supra), the Hon'ble High Court in para 16 has observed that "the period of limitation under the Act "would not apply as explained in **Salonah Tea Company Limited vs Superintendent of Taxes**, 1988 (33) ELT 249 (SC). The application of refund having been made well within the period of **three years** after discovery of mistake by the Appellants, are not barred by limitation". Thus, the Delhi High Court, for refund, has allowed a period of **three years**. Similarly, the Hon'ble Supreme Court in the case of **ITC Limited** (supra) has discussed the provisions of Section 11B of the Central Excise Act, 1944, as amended from time to time. The Hon'ble Supreme Court has held that :

"It has been settled by this Court that where excess duty was not payable by the party under the provisions of a statute but had in fact been paid under a mistake of law, the party has a right to recover it and there is a corresponding legal obligation on the part of the Government to refund the excess duty so collected because the collection in such cases would be without the authority of law. The payment and recovery of excess excise duty was thus on account of a mutual mistake. We are, therefore, of the opinion that the High Court, while disposing of the writ petition under Article 226 of the Constitution of India, was perfectly justified in holding that the bar of limitation which had been put against the respondent by the Collector of Central Excise (Appeals) to deny them the refund for the period 1-9-1970 to 28-5-1971 and 1-6-

1971 to 19-2-1972 was not proper as admittedly the respondent had approached the Assistant Collector Excise soon after coming to know of the judgment in Voltas case and the assessee was not guilty of any laches to claim refund."

10. In the instant case, it appears that no tax was due against the assessee-Appellants as the services provided by them were not subject to tax. At the relevant time, there was no authority/provision to collect the tax from the assessee-Appellants. Hence, this is an amount which was deposited in good faith. In the case of **KVR Construction** (supra), the Hon'ble Kerala High Court has observed that :

"19. According to the appellant, the very fact that said amounts are paid as service tax under Finance Act, 1994 and also filing of an application in Form-R of the Central Excise Act would indicate that the applicant was intending to claim refund of the duty with reference to Section 11B, therefore, now it is not open to him to go back and say that it was not refund of duty. No doubt in the present case, Form-R was used by the applicant to claim refund. It is the very case of the petitioner that they were exempted from payment of such service tax by virtue of circular dated 17-9-2004 and this is not denied by the Department and it is not even denying the nature of construction/services rendered by the petitioner was exempted from to payment of Service Tax. What one has to see is whether the amount paid by petitioner under mistaken

*notion was payable by the petitioner. Though under Finance Act, 1994 such service tax was payable by virtue of notification, they were not liable to pay, as there was exemption to pay such tax because of the nature of the institution for which they have made construction and rendered services. In other words, if the respondent had not paid those amounts, the authority could not have demanded the petitioner to make such payment. In other words, authority lacked authority to levy and collect such service tax. In case, the department were to demand such payments, petitioner could have challenged it as unconstitutional and without authority of law. If we look at the converse, we find mere payment of amount, would not authorize the department to regularise such payment. When once the department had no authority to demand service tax from the respondent because of its circular dated 17-9-2004, the payment made by the respondent company would not partake the character of "service tax" liable to be paid by them. Therefore, mere payment made by the respondent will neither validate the nature of payment nor the nature of transaction. In other words, mere payment of amount would not make it a "service tax" payable by them. When once there is lack of authority to demand "service tax" from the respondent company, the department lacks authority to levy and collect such amount. Therefore, it would go beyond their purview to collect such amount. **When once there is lack of authority to collect such service tax by the***

appellant, it would not give them the authority to retain the amount paid by the petitioner, which was initially not payable by them. Therefore, mere nomenclature will not be an embargo on the right of the petitioner to demand refund of payment made by them under mistaken notion."

[Emphasis supplied]

11. Thus, in the instant case also, the assessee-Appellants were not subjected to Service Tax. Therefore, mere payment made by the assessee-Appellants will neither validate the nature of payment nor the nature of transaction. In other words, mere payment of amount would not make it a Service Tax payable by them. Hence, the amount deposited by the assessee-Appellants by mistake/good faith cannot be termed as 'Tax'.

12. During the course of arguments, the learned counsel for the assessee-Appellants relied upon the ratio laid down in the case **Kalpataru Power Transmission Ltd.** (supra) wherein the Service Tax collected without any authority was declared outside the purview of Section 11B of the Act. The Hon'ble Delhi High Court in the case of **Mera Baba Realty Associate (P) Ltd.** (supra) has mentioned that in such cases, the limitation of **one year** prescribed under Section 11B(1) of the Central Excise Act, 1944 would not apply and hence is not applicable.

13. Further, it may be mentioned that the Tribunal in the case of **Commissioner of Central Excise, Pune-III vs Shankar Ramchandra Auctioneers**, 2010 (19) STR 222 (Tri-Mumbai), has observed that the amount collected without authority of law,

the assessee is eligible for refund after analysing the issue as under :

'The learned DR submitted that refund claim is barred by limitation as it has been filed beyond the period of limitation and to support this contention, he placed reliance on *Jumax Foam Pvt. Ltd.* (supra) and *Karnik Maritime Pvt. Ltd.* (supra). In this case, they paid tax voluntarily, no protest was lodged and they have recovered the service tax also from their clients. In the case of *Beharay & Rath Construction* (supra), the respondents were the recipient of the Goods Transport Agency service and in that case they have claimed abatement. In the case of *Jumax Foam Pvt. Ltd.* (supra), the appellants filed the refund claim of the excess Service Tax paid by them. In such a situation, the facts are not similar to this case. In the case of *Hexacom (I) Ltd. v. Commissioner of Central Excise, Jaipur* - 2006 (3) [S.T.R.](#) 131 (Tribunal) = 2003 (156) [E.L.T.](#) 357 (Tri.-Del.), this Tribunal has held that if any amounts are collected erroneously as representing service tax, which is not in force, there is no bar to return of such amounts. Further, in the case of *CCE, Jaipur-I v. Jai Laxmi Finance Co.* - 2006 (3) [S.T.R.](#) 25 (Tri.-Del.), this Tribunal had again held that **the amount collected without authority of law, the assessee is eligible for refund.** In this case also, prior to 1-5-2006, the provisions of Service Tax were not applicable on the respondents and the amount paid as Service Tax was not payable by them at all. **In**

that situation, the provisions of Section 11B of Central Excise Act, 1944 extended to the Service Tax are not applicable to this case. Hence, the bar of limitation is not applicable to this case.”

[Emphasis supplied]

14. After considering the various case laws on the subject which are discussed in the above paragraphs, we come to the conclusion that Section 11B generally governs the claim for refund of duty and interest paid on such duty. The Section has been made applicable for service tax also. In the case of **KVR Constructions** (supra), the Hon'ble Kerala High Court has laid down yardsticks to decide those cases where Section 11B may not be applicable in service tax cases. The Hon'ble High Court has held that, if there is no authority to collect service tax by the department, it would not give them the authority to retain the amount paid which was initially not payable by them.

15. In the present case, the assessee-Appellants were rendering “liaisoning service”. The said services were not liable to Service Tax at the relevant time. Hence, the Department would not be in a position to collect service tax on the said activities since the same is not leviable. Consequently, in terms of the law laid down by the Hon'ble Kerala High Court (supra), the Government will have no authority to retain the said amount and will have to be refunded.

16. It may also be mentioned that in the case of **Hind Agro Industries Limited** (supra), we find that the Hon'ble Delhi High Court has circumscribed the above view by prescribing the **period of three years**, after discovery of the mistake, for claiming such refund.

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 2006-07 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 Brothers vs CIT**, 150 ITR 105 Kerala; and **CIT vs Maha Laxmi Sugar Mills**, 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 orders and direct the jurisdictional Commissioner to return the deposited amount, as per law.

20. In the result, both the appeals filed by the assessee-Appellants are allowed.

(Pronounced in the open court on 08.03.2017)

(V. PADMANABHAN)
MEMBER (TECHNICAL)

(JUSTICE Dr. SATISH CHANDRA)
PRESIDENT

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