**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**West Block No. 2, R.K. Puram, New Delhi – 110 066.**
**Principal Bench, New Delhi**

**COURT NO. III**

**DATE OF HEARING : 07/07/2017.**
**DATE OF DECISION : 20/07/2017.**

**Service Tax Appeals No. 56800 and 56798 of 2013**

[Arising out of the Order-in-Appeal No. 362/ST/DLH/2012 and No. 350/ST/DLH/2012 both dated 31/12/2012 passed by The Commissioner (Appeals), Central Excise, Delhi – I, New Delhi.]

M/s Alar Impex Pvt. Ltd. ] Appellants
M/s Alar Infrastructures Pvt. Ltd. ]

Versus

CC & CST, Delhi – I Respondent

**Appearance**

Shri B.K. Singh, Advocate – for the appellants.

Shri Amresh Jain, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
**Hon'ble Shri B. Ravichandran, Member (Technical)**

Final Order No. 55303-55304/2017 Dated : 20/07/2017

**Per. B. Ravichandran :-**

These two appeals are against order dated 31/12/2012 of Commissioner (Appeals), New Delhi and are dealing with common issue of appellant's eligibility to refund of service tax. These two appeals alongwith three others were disposed of vide final order of the Tribunal No. 54174-54178 of 2014 dated 22/10/2014. The present appellants filed appeals before the

Hon'ble Delhi High Court. The Hon'ble High Court remanded both the cases to the Tribunal vide their orders dated 14/10/2015 and 09/12/2015. The Hon'ble High Court in their order dated 14/10/2015 observed as below :-

> "3. Having heard the submissions of counsel for the parties, this Court finds that the question of applicability of Section 11B of the CE Act read with Section 83 of the Finance Act, 1994 to the refund application of the Appellant would arise only if the CESTAT came to the conclusion that the services rendered by the Appellant were in fact liable to service tax. If, on the other hand, the CESTAT finds that the services rendered by the Appellant were not amenable to service tax at all, the question of processing the refund application of the appellant with reference to Section 11B of the Act would not arise. This legal position has been made explicit in the context of a claim for refund under the Customs Act, 1962 in the decision of this Court in *Hind Agro Industries Limited* v. *Commissioner of Customs,* 2008 (221) E.L.T. 336 (Del.). In that decision the Court has discussed the legal position emerging from the decision of the Supreme Court in *Mafatlal Industries* v. *Union of India,* 1997 (89) E.L.T. 247 (S.C.).
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> 4. Consequently, the Court is of the view that the CESTAT ought to have first satisfied itself that the services rendered by the appellant was, on facts, amenable to service tax and different from the other three appeals which were heard together with the appellant's appeal and allowed by the same impugned order. If and only if the CESTAT finds that the services rendered by the appellant were in fact amenable to service tax would it then take up the question whether in terms of Section 11B of the Central Excise Act, 1944 and the claim of the refund was barred by limitation".

2. Thus, the only point for decision in these appeals is whether the payments made by the appellants are to be treated within the scope of the Finance Act, 1994 to which limitation as prescribed under Section 11B of Central Excise Act, 1944 has been made applicable.

3. The brief facts of the case are that the appellants provided taxable services to their foreign clients. The appellants are registered with the Department for payment of service tax in respect of various categories of taxable services. During the period April 2010 to March 2011, they provided taxable services to foreign clients for which they received consideration in convertible foreign exchange. They have paid service tax in respect of these transactions. However, later they have filed rebate claims in accordance with Rule 5 of Export of Service Rules, 2005 and Notification 11/2005-ST dated 19/04/2005. It is claimed that they have provided “business auxiliary services” to the foreign clients and the said service should be construed as export of service in accordance with Rule 3 (1) (iii) readwith Rule 3 (2) of Export of Service Rules, 2005. The claims were rejected by the Original Authority on the ground that the appellants failed to produce supporting agreements to ascertain the classification of service and accordingly the benefit of refund of service tax on services exported cannot be granted in terms of Notification 11/2005-ST dated 19/04/2005. On appeal, the said rejection was confirmed by Commissioner (Appeals). The matter was taken up

to the Tribunal by the appellants, alongwith three other cases, involving similar facts. The Tribunal disposed of all these 5 appeals by a common order dated 22/10/2014, the Tribunal observed as below :-

> "6. We have considered the submissions made by both the sides and perused the records. According to the appellants, they had provided the business auxiliary services by procuring the orders and marketing and sales promotion of the products of their foreign clients for which they had received the commission in convertible foreign exchange and on this basis, it is pleaded that service provided by them to their foreign clients was "business auxiliary service" covered by Section 65(105)(zzb) and since it has been provided to persons located outside India in relation to their business and payment for the same has been received in convertible foreign exchange, in terms of provisions of Rule 3(l)(iii) read with Rule 3(2) of the Export of Services Rules, 2005, the service so provided has to be treated as exported out of India. It is on this basis that the rebate is being claimed in terms of Rule 5 of the Export of Service Rules. Department's contention, on the other hand, is that the nature of services provided by the appellant to their foreign client is not known, as they have not produced the service agreements and therefore, it is not possible to ascertain as to which service was provided and accordingly whether the service so provided has to be treated as Export of Service in terms of Rule 3(1) read with Rule 3(2) of Export of Services Rules. However, it is seen that during the period of dispute, the appellants had filed ST 3 returns which have also been placed on record and in these returns, the Service provided is mentioned as "Business Auxiliary Service". Once the Service Tax has been collected by the department from the appellants by treating their

services as business auxiliary service at the time of considering the claim for rebate of the Service Tax so paid, the department cannot question the classification of the services. Therefore, the denial of rebate on the ground that in absence of service agreements, the nature and classification of services provided by the appellants, is not ascertainable, is not sustainable. However, for quantification of export rebate, the matter would have to be remanded, as the rebate would be admissible only of the Service Tax paid on the amount received by the Appellants for Services provided by them to their foreign clients.

7. As regards the question of limitation, by virtue of Section 83 of the Finance Act, 1994, the provisions of Section 11B of the Central Excise Act, 1944, would be applicable, in relation to Service Tax as they apply in relation to Excise Duty. In terms of Explanation (A) to Section 11B, the "refund" includes "rebate" of Duty of Excise on excisable goods exported out of India or excisable materials used in the manufacture of goods which are exported out of India. Applying this explanation to Service Tax matters, in case of Service Tax, the refund would include rebate of Service Tax paid on the services exported out of India. Therefore, the provisions of Section 11B would be applicable to rebate of Service Tax in respect of services exported. In terms of Section 11B(1) of Central Excise Act, refund claim is to be filed before expiry of one year from the "relevant date". The term "relevant date" is defined in explanation 'B' of Section 11B of the Act. Clause (a) of Explanation (B) defines the "relevant date" in case of goods exported out of India. According to Explanation B(a), the "relevant date" in case of goods exported out of India is -

(i) the date on which the ship or aircraft in which the goods are loaded/shipped, leaves India, in case of export of goods by sea or air;

(ii) the date on which the goods cross the frontier in case of export by land, and

(iii) the date of despatch of goods by post office concerned, to a place outside India, in case of export by post.

Thus, in terms of the above definition, in respect of goods exported out of India, "relevant date" is when the export of the goods is complete, in the sense that in case of export by sea, or air, the vessel/ aircraft in which the goods were loaded, leaves India or in case the export through land customs station, the date on which the goods have crossed the land frontier or in case of export by post parcel, the date on which goods are dispatched by the concerned post office to a place outside India. Applying this analogy, the "relevant date" in case of export of service, would be the date on which the service transaction is complete. Now, in this regard, difference between the event of 'export and a 'Service transaction' has to be kept in mind. Whole 'export' is taking some goods from a place in India to a place outside India, whether on sale or without sale, the service transaction is akin to a sale transaction and just as sale in transfer to property in goods by a person to another person for some consideration and a sale transaction is complete, when the property in goods has been transferred and the consideration for the same has been received, a service transaction is a contract for activity by a person (Service provider) for another person. (Service receiver) for some consideration and a service transaction has to be treated as complete only when the activity of the service provider as per the agreement has been completed and the consideration for the same has been received from the service receiver by the service provider. In case of export of Service, the services provider is in India and the services receiver is outside India. Therefore, in our view, a service transaction would be complete in case of export of service, when the service has been provided to the off-shore client and the payment for the service has been received and accordingly, the date on which the payment has been received has to be treated as the "relevant date" for the purpose of counting limitation period. Moreover, the terms of Rule 3(2) of the Export of Services Rules, 2005, the provision : of Services specified in Rule 3(1) shall be treated as export only when payment for such services has been received by the service provider in convertible foreign exchange and on this basis also, a transaction of service export is to be treated as complete only when the service has been provided and payment for the same has been received in convertible foreign exchange. We find that the same view has been taken by the Tribunal in the case of *CCE, Pune-I* v*. Eaton Industries P. Ltd.* referred in 2011-TIOL-166-CESTAT-Mum = 2011 (22) S.T.R. 223 (Tri.-Mumbai).

8. Since in case of Appeal No. ST/56798/2013 and ST/56800/2013, the rebate claims have been filed after expiry of one year from the date of receiving payments, these rebates claims have to be treated as time barred and as such, the orders rejecting their appeals on the ground of limitation have to be upheld. However, in other three appeals, the rebate claims have been filed within the limitation period and there is no dispute about limitation".

4. As already noted this order was put to challenge in respect of two appeals, wherein the claims were held to be barred by

limitation. The Hon'ble Delhi High Court remanded the matter for a fresh decision.

5. We have heard both the sides and perused appeal records.

6. In line with the direction of Hon'ble Delhi High Court, we have examined the facts of the case. The admitted position is that the appellants are engaged in providing taxable services. They did provide such taxable services to foreign clients. They have filed rebate claims for service tax and cess paid on taxable services exported to any country other than Nepal and Bhutan in terms of Notification 11/2005-ST. The said notification issued under the authority of Rule 5 of Export of Service Rules, 2005 stipulates that there shall be granted rebate of the whole of the service tax and cess paid on all taxable services exported in terms of Rule 3 of the said rules, to any country other than Nepal and Bhutan subjected to conditions limitations and procedures specified therein. Various conditions, limitation and procedures alongwith form for application are prescribed in notification itself. The appellants filed the claim in terms of the above legal positions. The Tribunal recorded in the final order dated 22/10/2014, that the appellants provided taxable service under the category of 'business auxiliary service' and the same has been mentioned in the periodical ST-3 returns filed by them. On merit, it was held that the service tax paid on exported service is available as a rebate to the appellant. It is clear from the facts, as mentioned above, that the appellants rendered taxable service

and their claim for rebate of such tax paid, is governed by the provision of Finance Act, 1994, Export of Service Rules, 2005 and accordingly we find that the provisions of Section 11B of Central Excise Act in so far as limitation is concerned, will be rightly applicable to the appellants. The tax is paid on taxable services. The Government has provided certain concession when the services were exported out of country. Such concession is subjected to various conditions and limitations. On fulfillment of such condition, the appellants shall be entitled for the rebate. We note that the Tribunal found in the final order dated 22/10/2014 that all the appellants did provide taxable service to foreign clients and on merit they are eligible for the rebate of such tax. However, in respect of two of the claims, the Tribunal noted one of the main conditions is filing the claim in time. The same has not been adhered to and accordingly their claims cannot be sanctioned. This is the distinction between the allowed rebate claims and the appellants case.

7. The learned Counsel for the appellants relied on certain case laws to support his claim that there can be no time limit under Section 11B when the amount paid by the appellants cannot be considered as service tax. We are not convinced by the submissions made by the appellants. First of all, it is clear that the appellants as a service provider rendered taxable services. The concession given in respect of services exported out of country is not absolute. The same has to be established on fulfillment of all the required conditions. On satisfactory

compliance of such conditions, the appellants will be entitled for return of the tax paid by way of rebate. For claiming such rebate the provisions of law including the period of limitation for such claim are to be followed by the appellant. We note that appellant placed reliance on the decision of Hon'ble Kerala High Court in **Geojit BNP Paribas Financial Services Ltd. vs. CCE, CUS & ST, Kochi** reported in **2015 (39) S.T.R. 706 (Ker.)** and Hon'ble Delhi High Court in **Hind Agro Industries Limited vs. CC** reported in **2008 (221) E.L.T. 336 (Del.)**. We note that the Hon'ble Kerala High Court was acting in terms of Artile 226 of the Constitution in writ-jurisdiction and held that the service tax paid by the petitioner on account of mistake of understanding the law is beyond the scope of limitation under Section 11B. Similarly, the Hon'ble Delhi High Court in **Hind Agro Industries Ltd.** (supra) was dealing with payment of an amount as cess which is not payable as per law.

8. As noted, in detail above, the appellants paid service tax payable on such taxable services. The claim for rebate is on the ground that they have exported the said taxable services out of India. In such situation, the provisions of the tax statute, namely the Finance Act, 1994, is correctly made applicable to the claims filed by the appellants. Here we also note that the Export of Service Rules, 2005 framed in exercise of powers conferred by Section 93 and 94 of the Finance Act, 1994, talk about power to grant exemption from service tax and power to make rules.

9. In view of the above clear legal positions, we are of the considered view that the appellants did render service which are liable to service tax. The claim for rebate has to be within the ambit of the provision of Section 11B of Central Excise Act, 1944 made applicable to the service tax collected in terms of Finance Act, 1994.

10. In view of the above findings, we hold that the present appellants claim for rebate is barred by limitation. The appeals are accordingly dismissed.

(Order pronounced in open court on 20/07/2017.)

**(S.K. Mohanty)**
**Member (Judicial)**

**(B. Ravichandran)**
**Member (Technical)**

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