CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi.

Date of hearing/decision: 24.08. 2017

S.T. Appeal Nos. 724 - 725 of 2012 – SM
(Arising out of order-in-appeal No. 56-57/BPL/2012 dated 20.03.2012 passed by the Commissioner (Appeals), Customs, Central Excise, and Service tax, Bhopal).

M/s Satya Prakash Builders Pvt. Limited Appellant

Vs.

CCE, Bhopal Respondent

Appearance:

Sh. Hemant Modh, Advocate for the appellant
Sh. U. Sengraj, AR for the respondent

Coram:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

Final Order Nos. 56324 – 56325/2017

Per: **Ashok Jindal**:

The appellants are in appeals against the impugned orders wherein refund claim was denied.

2. Brief facts of the case are that the appellants are contractor and executing works contract and as per the agreements the price which appellant received cum tax price. During the impugned period, the rate of service tax has been reduced from 12.36% to 10.3%. But, inadvertently the appellant paid service tax to the department @ 12.36%. On realisation that appellant has paid excess amount on account of service tax to the department, the appellant filed refund claims, the same was sanctioned for Rs. 50805/- by the adjudicating authority holding that for bar of unjust enrichment is not applicable and the remaining amount is time barred. The appellant filed appeal before the ld.

Commissioner (Appeals) and the ld. Commissioner also exercise their power reviewed the order passed by the adjudicating authority and hold that the bar of unjust enrichment is applicable. Therefore, rejected the refund claim. The appeal filed by the appellant before the Commissioner (Appeals) was also dismissed the claim of the appellant as time bared and unjust enrichment. Aggrieved from the said orders, the appellants are before me.

3. Ld. Counsel for the appellant submits that as the price of service rendered on account of works contract is inclusive of service tax, therefore, whatever rate of service tax is applicable during the impugned period was required to be paid by the appellant and admittedly the said amount is payable @ 10.3%. The appellant has inadvertently paid service tax @ 12.36% which was not liable to be paid by the appellant. Therefore, the excess amount is to be refunded to them as the same is not the service tax and therefore the provisions of Section 11B of the Act are not applicable. He further submits that as it is cum tax price, therefore bar of unjust enrichment is not applicable.

4. On the other hand, ld. AR opposed the contention of the ld. Counsel and submits that as appellant has paid service tax @ 12.36%. Therefore, they have paid tax voluntarily and provision of Section 11B of the Act are applicable with regard to the unjust enrichment it is his submission that as appellant collected the said amount from the service receipient, therefore, have not produced any documentary evidence, therefore, bar of unjust enrichment is applicable.

5. Heard both the parties and considered the submissions.

6. In this case, it is an admitted fact that during the impugned period the rate of service tax was 10.3% and all the works executed by the appellant are cum tax price. In the agreement rate of service tax has not been provided. Therefore, whatever service tax is to be paid by the appellant to the department same is to be borne by the appellant for example if service tax rate of zero or it is 10% or 20% whatever tax, the same is payable same is payable by the appellant. In that circumstances, the excess amount paid by the appellant is from the own pocket and not recovered separately from the service recipient. In that circumstances, I hold that in such a case, bar of unjust enrichment is not applicable.

7. With regard to the issue of limitation, I find that during the impugned period the service tax payable by the appellant is @ 10.3% whereas they have paid inadvertently @ 12.36%. The excess amount paid by the appellant is not service tax as it is not legally payable by the appellant. In that circumstances, the excess amount paid by the appellant does not invoke provision of Section 11B of the Act. Therefore, the limitation is not applicable. In that circumstances, the impugned orders are set aside. Appeals are allowed with consequential relief.

(Dictated and pronounced in the open Court).

(Ashok Jindal)
Member (Judicial)

Pant