

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing/decision: 25.09. 2017

S. T. Appeal No. 505 of 2012

(Arising out of order-in-appeal No. 06/BPL/2012 dated 23.01.2012 passed by the Commissioner of Central Excise (Appeals), Bhopal).

M/s Ramky Infrastructure Limited Appellant

Vs.

CCE, Bhopal Respondent

Appearance:

Sh. Rachit Jain, Advocate for the assessee
Sh. Sanjay Jain, AR for the Revenue

Coram:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order No. 56806/2017

Per: **Justice (Dr.) Satish Chandra:**

The present appeal is filed against the order-in-appeal No. 06/BPL/2012 dated 23.01.2012 passed by the Commissioner of Central Excise (Appeals), Bhopal. The period of dispute is 01.07.2007 to 31.12.2008.

2. Brief facts of the case are that the appellant was awarded certain projects by Municipal Corporations of Bhopal and Jabalpur for execution of works relating to supplying, laying, jointing, testing and commissioning of sewers in different areas of Bhopal and Jabalpur. The appellant raised running bills on the

basis of work performed by it. The appellant did not charge service tax in its running bills, from the Municipal Corporations. However, as doubts prevailed in the industry whether the activities of the nature carried out by the appellant was liable to service tax. The appellant paid the service tax for the said work under the category of 'Work Contract Service' from its own pocket without collecting it from the Municipal Corporation. Service tax return was accepted by the department. Later, by following the ratio laid down in the case of ***Indian Hume Pipe Co. Ltd. vs. CCE, Trichy – 2008 (12) STR 363 (Tri. Mad.)*** where it was observed that such work is not the subject to service tax, the appellant has filed the application for refund claim in respect of the service tax paid by them under the 'Work Contract Service'. The same was denied by the Department. Being aggrieved, the present appeal has been filed by the appellant.

3. With this background, we heard Sh. Rachit Jain, Id. Advocate for the appellant and Sh. Sanjay Jain, Id. AR for the Revenue.

4. After hearing both the parties and on perusal of record, it appears that the identical issue has come up before the Tribunal in the case of ***Ramky Infrastructure Ltd. vs. CST-II Kolkata -2017-TIOL-1782-CESTAT-KOL*** where it was observed that-

11. Regarding unjust enrichment, the assessee sold the goods on a composite price inclusive of all duties, there is no question of unjust enrichment as has been held by the Tribunal in the case of Himatsingka Seide Ltd. v. Commissioner of Customs, Bangalore [2005 (191) E.L.T. 885 (Tri.-Bang.)]. The relevant portion of the said decision is reproduced below:-

6. We have gone through the rival contentions. This is a case where de-bonded goods have sold. There is nothing wrong in the presumption of the Revenue that the duty burden is included in the

sales price. But the error committed by the Revenue is in presuming that duty collected in excess of what is payable had been passed on to the buyers. Whenever there is a composite price inclusive of all duties, the meaning is that the price includes only the duty payable. We cannot presume that the excess duty paid by mistake is passed on to the buyer. The Honble Tribunal in the case of Cimmco Ltd. v. Collector of Central Excise, Jaipur [1999 (107) E.L.T. 246 (Tribunal)] had interpreted the term inclusive of all duties and tax and it has been held therein that condition in work order that the words inclusive of all duties, taxes does not mean that excise duty is covered by it especially when appellant has been taking a stand from the beginning as to non-excisability of goods. It is worthwhile to briefly mention the facts of the case. In the above-mentioned case, the appellant had a contract with M/s. I.O.C. Ltd. for supply of 150 tank wagons; for supply, fabrication and mounting of heating coils inside tank wagons for LSHS service. The contract covered 150 tank wagons. They applied for permission under Rule 173H of Central Excise Rules for bringing duty paid wagons and other duty paid materials for such fabrication job. After obtaining necessary permission from the Department, they executed the work and cleared the tank wagons on payment of duty, as demanded by the Department, under protest. Thereafter they claimed refund. The refund claim was rejected. But the Collector (Appeals) held that the process carried out by the appellants did not amount to manufacture and since the Assistant Commissioner had concluded that the goods are covered by Rule 173H, he should have been allowed clearance without payment of duty. In view of the favourable order, the appellants filed a refund claim for the consequential refund amount. But the claim was rejected on the ground of unjust enrichment. The Revenue relied on the work contract which indicates that the rates are inclusive of all taxes. The Tribunal interpreted the terms inclusive of all duties and held that the provision that the rates are inclusive of all duties would not lead to the necessary presumptions or conclusion that excess duty should be held to have been covered or provided for. The price here was a lump sum amount and the usual condition that the rates are inclusive of all duties and taxes is only with a view to avoid any possibility of the supplier raising any demand at a later stage on the ground that certain duties are to be paid. The expression rates are inclusive of all duties and taxes have to be understood as applicable to only duties and taxes which are payable. The Tribunal held in the above mentioned case that there is no unjust enrichment and the appellants would be entitled to obtain refund.

The ratio of the above case is clearly applicable here. In the present case also, the sale price, no doubt, includes all statutory levies payable. That means, after some time the seller should not come to the buyer for extra amounts on the plea that further duty has to be paid to the Department. The presumption that the sale price includes duty erroneously paid in excess has no basis. More precisely, the sale price includes only the duty payable. In these circumstances, there is no question of unjust enrichment. We allow the appeal with consequential relief.

13. *In the recent decision of the Division Bench of the Tribunal in the case of M/s.Monnet International Ltd. & Another vs. CCE, New Delhi by Final Order No.52170-52171/2017 dated 08.03.2017 allowed the appeal on the identical situation. In that case, the assessee was providing liaisoning servicesto M/s.Dongfeng Electric Corpn., China during the period 01.06.2005 to 31.01.2007. They 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 on 02.01.2008, they filed refund claim after knowing the fact that the liaisoning serviceswere not subject to Service Tax. The refund claims were rejected by the lower authorities being time barred as per section 11B of the Central Excise Act, 1944. The Tribunal allowed the appeals filed by the assessee. It has been held as under:-*

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.

14. On perusal of the above decisions of the Honble High Court and the Tribunal, it is seen that the limitation under section 11B of the Central Excise Act would not be applicable in case of payment of tax mistakenly. Further, the principle of unjust enrichment would not apply in the case of composite contract price, as applicable in the present case. The Id.A.R. on behalf of the Revenue strongly relied upon the decision of the Honble Supreme Court in the case of Mafatlal Industries Ltd. (*supra*). I find that the Honble High Court and the Tribunal, in various judicial decisions, after discussing the decision of the Honble Supreme Court in the case of the Mafatlal Industries Ltd., (*supra*) held in favour of the assessee. In the

present case, I do not find any reason to reject the refund claims after perusing the above decisions. I have also seen the sample invoices placed by the appellants. There is no dispute that the appellant is entitled to refund of payment of tax made by mistake. The various judicial authorities held that the refund should not be denied on the ground of time barred and unjust enrichment in such situation. Therefore, the appellant is entitled to get the refund of tax as claimed by them.

5. By following our earlier order (supra), we set aside the impugned order and allow the claim of the appellant.

6. In the result, appeal filed by the appellant is allowed.

(Dictated and pronounced in the open Court).

(V. Padmanabhan)
Member (Technical)

(Justice (Dr.) Satish Chandra)
President

Pant

