IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing/Decision:27.10.2017

Service Tax Appeals Nos.843-845/2012 (DB)

[Arising out of common Order-in-Appeal No.IND/CEX/000/APP/64-66/2012 dated 14.03.2012 passed by the Commissioner (Appeals), Customs & Central Excise, Indore]

M/s.National Fertilizers Appellants

Vs.

CCE, Indore Respondent

Appearance:

Rep by Shri R. Krishnan, Advocate for the appellant.
Rep. by Shri S. Jain, AR for the respondent.

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

Final Order Nos.57553-57555/2017

Per B. Ravichandran:

These three appeals are against common impugned order dated 14.03.2012 of Commissioner (Appeals), Indore. The appellants are procuring natural gas to be used as fuel in the manufacture of fertilizers in their factory. They are getting gas from Gas Authority of India Ltd.(GAIL), Indian Oil Corporation (IOCL) and Bharat Petroleum Corporation Limited (BPCL) through pipelines, which are owned by GAIL. In term of Section 65(105)(zzz) read with Section 65(50) of the Finance Act, 1994, transport of goods through pipelines is leviable to service tax. The appellants paid service tax to M/s.GAIL, who in turn, remitted the tax to the Government. The rates for transportation of gas through pipelines were provisionally determined by the Petroleum and Natural Gas Regulatory Board (PNGRB) and the provisional prices were finalized by the said Authority later. In the present case, the rates finalized by the Board were lesser than the amount, which was provisionally charged earlier. Therefore, the appellants were issued with credit notes by GAIL/IOCL/BPCL for excess amount charged towards transportation of gas through pipelines. The rates were finalized by the Board on 9.6.2010. Thereafter, the appellants filed refund claim within one year as they have borne the service tax on such transportation of gas. The claims were rejected by the lower authorities mainly on the ground of time bar. The reason being that GAIL has not paid service tax on provisional basis nor the assessment was provisional with regard to such services. It was held that proof of payment of tax by GAIL/IOCL/BPCL has not been submitted by the claimant. The Lower Authorities also recorded that the appellant would have realised the service tax initially paid by passing on the burden of tax to their buyers.

2. Ld. Counsel for the appellant submitted that identical set of facts came before the Tribunal for consideration in case of **M/s.Chambal Fertilizers and Chemical Ltd. – 2017 –TIOL-407-CESTAT-DELHI** and **M/s.DCM Shriram Consolidated Ltd. – Final Order No.52049/2017 dated 17.02.2017.** It was held that for the purpose of computing the time limit under Section 11 B, the date of issue of credit notes is relevant and then only the provisional price gets finalized.

3. Ld. Counsel submitted that in the present case, there is no question of undue enrichment as they are involved in the manufacture of fertilizers, which is sold on controlled prices per the Government's orders. Further, they have shown the refund amount due as "refund due from the Government" in their accounts. They have also submitted certificate from Chartered Accountant that the tax burden has not been passed on to anybody else.

4. Ld. AR for the Revenue submitted that the lower authorities are correct in holding that the claims were barred by limitation as the provisions of Section 11 B are clear in this regard. There is no provisional assessment for service tax payment by the service provider. Further, the payment of tax by the service provider to the Government has not been evidenced with supporting challans by the claimant.

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

6. We note that on the question of limitation, the decisions relied upon by the appellant are applicable to the facts of the present case. The taxable value was not final and the same is determined by a statutory authority in terms of Petroleum and Natural Gas Regulatory Board (Determination Of Natural Gas Pipeline Tariff) Regulation 2008. The Board, which was constituted under the Petroleum and National Gas Regulatory Board Act, 2006 is entrusted with fixing the tariff, determination the actual tariff, which are to be followed by the gas companies. In such situation, it is apparent that the service tax payment is on a provisional value. The tariff is managed by statutory Authority as per law passed by Parliament. As such, following the ratio of the Tribunal in the above mentioned decisions, we hold that the limitation has to be accordingly reckoned and the claims are to be processed.

7. Regarding the evidence of payment of service tax to the Government, the appellant claimed that the provider of service has given a certificate to this effect. These are Public Sector Undertakings and have categorically stated that about the payment of service tax. We note that, if need be, such payment can be cross-verified by the Original Authority with jurisdictional officer in order to satisfy the correctness of the claim. Similarly, the appellant claimed that they are not barred

by the legal principles of undue enrichment. Their accounts as well as supporting certificate by the Chartered Accountant is to the effect that this amount is shown as receivables from the Government and not passed on to any other person. In such situation, we find that there is no applicability of concept of undue enrichment. The accounts of the appellant can be verified in this regard.

8. In view of the above discussions and analysis, we set aside the impugned order and remand the matter to the Original Authority for a fresh decision keeping in view the above observations. Adequate opportunity shall be provided to the appellant to present their side of the case with supporting documentary evidences.

[operative portion of the order already pronounced in the open court]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.