

**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. IV

DATE OF HEARING : 08/12/2017.

DATE OF DECISION : 20/12/2017.

Service Tax Appeal No. 52880 of 2016

[Arising out of the Order-in-Appeal No. 135/ST/APPEAL-II/MK/ GGN/2015-16 dated 09/09/2016 passed by The Commissioner of Service Tax (Appeals – II), Delhi, Gurgaon.]

M/s ITD-ITD-CEM Joint Venture

Appellant

Versus

CST, New Delhi

Respondent

Appearance

S/Shri Sujit Ghosh, Pragya Awasthi, Rarraah Gujar, Advocates – for the appellant.

Ms. Neha Garg, Authorized Representative (DR) – for the Respondent.

**CORAM : Hon’ble Shri Justice Dr. Satish Chandra, President
Hon’ble Shri B. Ravichandran, Member (Technical)**

Final Order No. 58469/2017 Dated : 20/12/2017

Per. B. Ravichandran :-

The appellant is a joint venture company between Italian Thai Development Public Limited (ITD) and ITD Cementation India Limited. The appellant was awarded a contract for execution of civil work for DMRC on 05/09/2007. To execute the said contract, the appellant entered into a lease agreement dated

21/11/2007 with ITD Thailand for leasing and importing 4 tunnel boring machines from Thailand. The appellant paid service tax on reverse charge basis under the category of "supply of tangible goods for use" for leasing these tunnel boring machines. They have paid service tax of Rs. 11,25,05,830/-. Later they realized that service tax is not liable to be paid on such lease transaction and filed a claim for refund on 28/03/2012. A notice dated 23/04/2012 was issued to the appellant to reject the said claim. The notice listed out various deficiencies in the said claim. The matter was adjudicated by the Jurisdictional Assistant Commissioner of Service Tax. Vide order dated 11/04/2013 he rejected the claim on merit. On unjust enrichment he observed that the appellant could not have transferred the burden of service tax to any other party. On appeal, the Commissioner (Appeals) vide his order dated 29/01/2014 set aside the original order with a direction to the Assistant Commissioner to sanction the refund claim after verifying the relevant documents. Since, even after 4 months of this order, no refund was sanctioned, the appellant approached the Hon'ble Delhi High Court by filing a writ-petition No. 8759/2014. The Hon'ble High Court disposed of the writ-petition on 10/12/2014 with the direction to the Assistant Commissioner of Service Tax to complete the verification of documents and sanction the refund claimed by the petitioner within a period of 4 weeks provided there is no stay order granted by the Tribunal. The said time was extended further by order dated 16/01/2015 for two more weeks. In the

meantime, the appeal filed by the Revenue against the order of Commissioner (Appeals) dated 29/01/2014 was decided by the Tribunal vide final order No. 50320/2015 dated 27/01/2015. The Tribunal found no merit in the appeal by the Revenue and accordingly dismissed the appeal alongwith the stay petition. Thereafter, the Jurisdictional Assistant Commissioner of Service Tax passed an order on 28/01/2015 sanctioning the amount of refund claimed by the appellant. However, holding against the appellant on the point of undue enrichment as per Section 11B of Central Excise Act, 1944 he transferred the refund amount to the Consumer Welfare Fund. The appellant again approach the Hon'ble Delhi High Court against this order. The Hon'ble Delhi High Court directed the appellant to file statutory appeal before the Appellate Authority. The said appeal was filed and was decided by the impugned order dated 09/09/2016. The Commissioner (Appeals) upheld the original order on transferring the refund amount to the Consumer Welfare Fund in terms of Section 11B. Aggrieved by this, the appellant filed this appeal.

2. We have heard both sides extensively and also perused the appeal papers and various case laws relied upon by the appellant. To begin with we note that when the claim for refund was filed the Original Authority decided the admissibility of the claim vide his order dated 11/04/2013. The Original Authority recorded as below :-

"12. Now on the issue (d) above, whether the refund claim is affected under unjust enrichment or otherwise, I observe that the principle of unjust enrichment in tax jurisprudence implies the retention of a benefit by a person retains money or benefit which is in justice, equity and good conscience, belong to someone else. Thus no person can be allowed to enrich inequitably at the expense of another. A right of recovery under *doctrine of "unjust enrichment"* arises when retention of a benefit is considered contrary to justice or against equity.

As per 'clause – 3.5' of the agreement, "The payments are to be exclusive of Value Added Tax or any national federal or local service tax levied by the tax authority of India. Such taxes shall include, but not be limited to, corporate taxes, taxes on equipment of the lease of equipment, import and export duties, withholding taxes and taxes on personnel. Pursuant to this Agreement, should any such taxes or duties be imposed on the lessor in the course of mobilization/ demobilization or during the deployment of the plant and equipment (during the execution of the Main Contract) the lessee shall reimburse the lessor for any such cost incurred. The lessee shall indemnify and hold the lessor harmless from any and all tax liabilities levied upon the lessor by the Indian Statutory /Government Authorities".

As per clause – 3.7 of the agreement, "All payments due to the lessor shall be NET without the deduction of any retention and/or local taxes for any reason".

Therefore, it is evident that there was no liability on the lessor to bear any kind of tax as per any Indian tax provisions. Hence, the party could not transfer the burden of service tax on the lessor. Further, the party has submitted copy of page-7 of tender document of DMRC,

which states that DMRC is performing a railway project, hence exempt from service tax and accordingly they will not reimburse any kind of service tax paid by the party on any account. Therefore, it is also clear that the party could not transfer the burden of service tax on DMRC as well. There was no other party on which the party could have transferred the burden of service tax. The party has submitted a Certificate from Chartered Accountant to the effect that there would be no unjust enrichment, if the party is refunded by the amount of the claim.

However, as discussed in Para 11 that the refund claim is not legally tenable, the party would enriched unjustly if the amount of claim is refunded. Hence, the principle of unjust enrichment as prescribed under Section 11B is also not satisfied in this case”.

3. The above findings were recorded after holding that the refund claim is not entitled to the appellant on merit. It is clear that on the issue of unjust enrichment, the Original Authority has categorically recorded that the appellant could not transfer the burden of service tax and DMRC and also there is no other party on whom they could have transferred the burden of service tax. It is also recorded that the appellant has submitted a certificate from Chartered Accountant to the effect that there would be no unjust enrichment if the appellant is refunded the amount claimed. Having recorded such a categorical finding, the Original Authority held since the refund is not tenable on merit, “the party would enriched unjustly if the amount of claim is refunded. Hence, the principle of unjust enrichment as prescribed under Section 11B is also not satisfied in this case”. We find that such

conclusion is contrary to the factual finding recorded in the previous paragraph in the said order. In other words, it would appear that while the appellant has not transferred the burden of service tax to any person, still will be enriched by the sanction of refund, is the conclusion drawn by the Original Authority which, to put it simply, is absurd.

4. After the above-mentioned original order, the matter travelled further up to the Tribunal only on the issue of merit. The Commissioner (Appeals) vide order dated 29/01/2014 deciding on merits of the case categorically held that the appellants are eligible for refund and directed the Jurisdictional Assistant Commissioner to sanction the instant refund claim after verifying the relevant documents. On further appeal by the Revenue, the Tribunal vide order dated 27/01/2015 upheld the order of Commissioner (Appeals) by dismissing the appeal by Revenue. The Original Authority proceeded to sanction the refund in pursuance of such direction. However, he credited the sanctioned refund amount to the Consumer Welfare Fund holding that the appellant will be unduly enriched if the amount is sanctioned to them. As elaborated above, we note a factual finding has been recorded by the first order-in-original dated 11/04/2013 which is categorical on the issue, though the conclusion was self-contradictory and perhaps was due to incorrect usage of words. As such, we find no justification in the second proceedings for the Original Authority to again take up

the question of unjust enrichment. In any case, we are now examining the merit of such finding recorded by the lower authorities in the second round of proceedings.

5. The admitted facts are that the appellant received 4 tunnel boring machines in terms of a lease agreement which is not liable to service tax. The issue on merit is settled in favour of the appellant. The appellant claimed refund of service tax paid on reverse charge basis in terms of Section 66A, mistakenly, on such non-taxable activity. We note that the tax entry of "supply of tangible goods for use" came into force from 16/05/2008. This is much after the contract with DMRC was entered into which is on 05/09/2007. Hence, there can be no question of possible service tax component in built in such contractual arrangement.

6. The appellants categorically submitted that they did not bill or receive any amount attributable to service tax from any persons with reference to these 4 tunnel boring machines. This is supported by a Chartered Accountant certificate. The Tribunal in series of judgments held that the certificate of Chartered Accountant is relevant and should be considered as a corroborative evidence. Reference can be made to the decisions in **Equinox Solution Ltd. vs. CC (Import), Mumbai – 2011 (272) E.L.T. 310 (Tri. – Mumbai)**, **Eastern Shipping Agency vs. CST, Ahmedabad – 2013 (32) S.T.R. 630 (Tri. – Ahmd.)** and **Afcons Infrastructure Ltd. vs. CCE & ST, Daman – 2015 (329) E.L.T. 390 (Tri. – Ahmd.)**.

7. Apart from a certificate of Chartered Accountant, the appellant also furnished a denial letter dated 29/12/2011 of DMRC in which DMRC rejected the claim of price variation requested by the appellant which included the disputed service tax amount. The appellants have furnished balance sheet for the year 2014-2015 in which the service tax amount is shown as "receivable". Further, the appellants have shown complete bifurcation of agreed contract price wherein service tax amount was never contemplated.

8. We find that the reliance of the lower Authorities on the phrase "inclusive of tax" in the contract to hold that the appellants collected service tax is legally unsustainable. The Hon'ble Supreme Court in **Deputy Commissioner of Commercial Taxes vs. Hindustan Lever Ltd. – (2016) 13 SCC 28** dealing with the sales tax matter held that when the respondent was not liable to pay tax and had not passed on the tax liability, sale consideration should not be fabricated and denied on the basis of any assumption that the sale price received must have included the tax. This fiction has no application in the facts of the said case. The Apex court further held that there is neither such principle nor any percept in law. In **PSL Limited vs. CCE, Rajkot – (2005) SCC Online CESTAT 2508**, the Tribunal held that if the contract price is stated to be inclusive of excise duty it does not mean that the same has been collected from the customer. The Tribunal in **CIMMCO Ltd. vs.**

CCE, Jaipur – 1999 (107) E.L.T. 246 (T) held that the clause “inclusive of duty” is put in a contract/work order only in our view to avoid any possibility of supplier raising any demand at a later stage on the ground that certain duties are to be payable. The Tribunal rejected the contention that rates are “inclusive of taxes” would led to presumption that excise duty was recovered or provided for the appellants.

9. In the present case, we note that the tax entry on “supply of tangible goods for use” itself came into effect only from 16/05/2008. The tax liability under such entry is not even existing at the time when the appellant entered into contract with DMRC. Hence, the question of factoring such tax liability in the contract price is not possible. We also refer to the decision of the Tribunal in **Himatsingka Seide Ltd. vs. CC, Bangalore – 2005 (191) E.L.T. 885 (Tri. – Bang.)**. The Tribunal held that there can be no presumption that duty collected in excess of what is payable is passed on to the buyers. Whenever there is a composite price inclusive of all duties, the meaning is the price includes only the duty payable. No presumption can be made that excess duty paid by mistake is passed on to the buyer. In the present case, there is not even a tax liability on the date of conclusion of contract with DMRC. We also note that the reliance placed by the lower authorities on certain decided cases is out of context and not appropriate. In fact, we have noticed that certain selected portion of the orders were referred without referring to

the ratio and the conclusion. A reference can be made on the reliance placed by the Revenue on **CIMMCO Ltd.** (supra). In fact the said decision is supporting the contention of the appellant. Similarly, the reliance placed on the decision of the Tribunal in **CST, Delhi vs. V.S. Infrastructure Capital Ltd. – 2012 (25) S.T.R. 170 (Tri. – Del.)** is found to be in fact in favour of the appellant.

10. We note Hon'ble Bombay High Court in **Mather & Platt Ltd. vs. State of Maharashtra – 1983 (53) STC 104** dealing with sales tax matter held that so long as purchaser is not led to believe that the amount charged to him is the amount which the seller would be liable to pay as tax to the Government when he is not liable to pay it, there would be no contravention of Section 46 (2) of Bombay Sales Tax Act, 1959. The said section prohibited any person against collected tax in certain cases. The dispute is that the petitioner collected certain surcharge which Revenue held as attributable to tax. In **Prabhu Dayal Kanojiya vs. CCE, Jaipur - 2014 – TIOL – 1279 – CESTAT – DEL.**, the Tribunal dealing with provisions of Section 73A which are parallel to the principle of unjust enrichment held as below :-

"5. Section 73A of the Act enumerates provisions for liability to remit service tax collected by a person. Sub-section (2) of this provision enacts: where any person, who has collected any amount, which is not required to be collected, from any other person, in any manner, as

representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government. On a true and fair construction of this provision, the legislative intent is clear. The conditions precedent for ordering any person to remit (an amount collected as service tax, which is not required to be so collected), is a finding of fact that the person had in fact collected an amount towards service tax even though no service tax liability arises under the transaction qua which such collection is made. This finding of fact must be recorded by the Revenue. The liability to remit service tax under Section 73 A (2) does not arise on the basis of a mere permission in an agreement that the liability to compensate/reimburse to service tax liability of the service provider, is on the service recipient. A factual finding that a person has collected service tax is a condition precedent for passing an order under Section 73A (2) readwith sub-Section (4) thereof. Sub-Section (4) specifically enjoins that an order should be passed under this provision only after considering the representation, if any, made by the person on whom the notice is served under sub-Section (3) and to determine the amount due from such person, not being in excess of the amount specified in the notice. Sub-section (3) of Section 73(A) requires a notice to be issued to show cause why the amount, as specified in the notice, in respect of a liability arising under Section 1 and 2, should not be paid by the Noticee to the credit the Central Government".

11. In view of our above analysis, we find that the lower authorities fell in error in holding against the appellant on the question of unjust enrichment. We find no legal or factual

justification for such finding. Accordingly, we set aside the impugned order and allow the appeal with consequential relief.

(Order pronounced in open court on 20/12/2017.)

(Justice Dr. Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

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