CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD
REGIONAL BENCH - COURT NO. – I
Single Member Bench

Service Tax Appeal No. 30360 of 2020
(Arising out of **Order-in-Appeal** No.TTD-EXCUS-000-APP-055-19-20, dated 13.11.2019 passed by Commissioner of Central Tax & Customs, Guntur)

Aegis Logistics Ltd., .. **APPELLANT**
Bhavyalakshmi Krishna Residency,
H.No.6-3597/A/1/2, Flat No. 201,
Venkata Ramana Colony,
Khairatabad, Hyderabad,
Telangana – 500 082.

VERSUS

Commissioner of Central Tax .. **RESPONDENT**
Tirupati – GST
No. 9/86, West Church Complex,
Amaravathi Nagar, MR Palli Road,
Thirupathi, Chittor,
Andhra Pradesh – 517 502.

APPEARANCE:
Shri Ramakrishna Raghavendra Lingsur, CA for the Appellant.
Shri A V L N Chary, Authorised Representative for the Respondent.

CORAM: HON'BLE Mr. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30103/2023

Date of Hearing:01.05.2023
Date of Decision:01.05.2023

[ORDER PER: A.K. JYOTISHI]

The Learned CA, duly authorised by the Appellant submits that M/s Aegis Logistics Ltd., (herein after referred to as Appellant) were providing certain services like maintenance and repair services etc., to M/s Hindustan Petroleum Corporation Ltd.,(HPCL) during the period March 2015 to January 2016. Appellant had also issued invoices to M/s HPCL for the services rendered by them during the said period and also discharged service tax on such invoices on self-assessment basis. Later on, HPCL disputed some of these invoices on that ground that they were not actually rendered by the Appellants as was mutually agreed and that the said dispute remained unresolved as of 20.06.2017. The Appellant, therefore, passed credit notes in their books of account for reversing the invoice income, including service tax, on the said invoices. They also took credit of excess service tax paid on the output services in respect of the unpaid/disputed invoices as per Rule 6(3) of Service Tax Rules 1994. Further, instead of carrying forward the excess tax paid as credit in Tran-1, the Appellant preferred refund manually initially but since it was not received in the Department, a fresh refund was filed on 18.03.2019.

2. The Learned Counsel further submitted that the Original Authority rejected the claim vide order dated 25.07.2019 on the grounds that the claim is time barred, prone to unjust enrichment, lacks merits and primarily beyond the scope of Finance Act 1944. On appeal to Commissioner (Appeals), the order of the Original Authority was upheld and their appeal was rejected. It is against the impugned Order-in-Appeal dated 13.11.2019, this appeal has been filed before the CESTAT.

3. He further submits that they realised later on that they had paid excess service tax, as the liability to pay tax on such services were not due as they were not completed. Therefore, they preferred refund claim on the basis of clarification issued by Board on this issue vide Circular No. 144/13/2011 dated 18.07.2011. Thus, according to him when amount payable as service tax was not required to be paid as service tax, such tax/amount assumes the character of deposit and hence no limitation is applicable. Additionally, he pleaded that the amount/tax was paid under mistake of law or being patently illegal, it was not hit by limitation under Section 11B.

4. The appellants have primarily canvassed that what they had paid was in the nature of excess duty paid by them for the services provided. Therefore, the refund is admissible as the tax paid on such invoices, on which they have not received payment from the HPCL, amounts to excess payment of tax and not in the nature of levy and is in the nature of deposit with the Government. They have cited certain case laws in support of their contention that service tax paid under mistake of law will not attract limitation prescribed under Section 11B of Central Excise Act. He has vigorously argued that in the case of Commissioner of Central Excise (Appeals), Bangalore Vs KVR Construction [2012 (26) S.T.R 195 (Kar)], the Hon'ble High Court has inter alia held that once a tax is not payable in law, there was no authority for Department to retain such amount and that it will not attract Section 11B. He further informed that SLP filed by Revenue has been dismissed by the Hon'ble Supreme Court as in [2018 (14) GSTL J 70 (S.C.)]. The appellants have also argued that provisions of unjust enrichment would not apply on duty paid by mistake of law.

5. The Learned DR, on the other hand, reiterated the grounds made in Order-in-Appeal by Commissioner of Central Tax (Appeals) and grounds taken by the Commissioner (Appeals) while upholding the order of the Original Authority rejecting the refund claim. He principally relied on the judgment passed by Hon'ble Supreme Court in the case of Mafatlal Industries Ltd., & Others Vs Union of India and others [(1997) 5 SCC 536 = 1997 (89) E.L.T. 247].(SC). The Learned DR has also relied on the Tribunal judgment passed by Single Member Bench in the case of Oil India Ltd., Vs Commissioner of Central Tax, Visakhapatnam [2019 (27) G.S.T.L.541 (Tri. – Hyd.)], wherein, it was held that the refund claim under Section 11B r/w Section 83 of Finance Act was not maintainable for any amount paid beyond the scope of Finance Act, 1994 itself.

6. The issue which needs to be decided is whether in the facts of the case, the refund was hit by the time bar as prescribed under Section 11B of Central Excise Act as made applicable to service tax by Section 83 of Finance Act 1994 or otherwise. On the one hand, the appellants are taking the plea that the service tax was paid under mistake of law and hence they are not hit by the limitation, whereas the Department is mainly relying on the ratio of Hon'ble Supreme Court in the case of M/s Mafatlal Industries Ltd., as per whcih such refund has to be within the provisions of statutory provisions under Central Excise Act/Finance Act. It is an admitted fact that refund has been filed beyond the limitation prescribed under Section 11B as made applicable to service tax. Therefore, the only question is whether there is a provision under the Central Excise law or Finance Act to waive the limitation, within Section 11B,in case the payment of service tax has been made under mistake of law. In the instant case, the appellants were admittedly providing "taxable services" to M/s HPCL and were raising invoices and paying service tax also from time to time. However, during the period March 2015 to January 2016, M/s HPCL did not honour some of the invoices and appellants did not get any payment. It is also an admitted fact that the appellants, suo-moto, took credit of excess "tax paid" and since they could not use such credit, they preferred a refund application.

7. What is therefore apparent is that the appellants were providing services, which were otherwise chargeable to service tax as per Finance Act 1994. Non receipt of payment on account of any commercial dispute cannot make such services as exempt services or an activity not amounting to "service" under the statutory provisions, on which no service tax can be

levied or collected. The appellant themselves have admitted that commercial dispute has been pending in arbitration in which these invoiced amounts including service taxes involved, are also covered. This clearly admits the position that services were provided on which applicable service tax was leviable. There is also no denial that there was no mistake of law in the sense that the tax was leviable on the categories of services being provided by them and the fact that they have provided such services irrespective of whether they have received the payment or not for some reason. The only ground is that they had not completed the service and hence at that stage at which they paid service tax, they were not liable to pay but they paid. They are not disputing non provision of service nor they are disputing that such services were not attracting service tax.

8. The whole issue of applicability of Section 11B or otherwise and by implication, that of limitation under the central excise statute has been debated in detail by the Hon'ble Supreme Court in the case of M/s Mafatlal Industries Ltd., & Others Vs Union of India and others [(1997) 5 SCC 536 = 1997 (89) E.L.T. 247] holding, inter alia, that refund application has necessarily to be filed in accordance with the provision of the enactment unless refund was as a consequence of declaration of any provision under the law as unconstitutional where the person may resort to the writ jurisdictions or Contract Act etc. In this case, the facts narrated in, paras supra, shows that refund was not on account of any provision of service tax, which has been declared as unconstitutional on any ground. I have also perused the order of the Commissioner (Appeals) who has relied on various judgments including Mafatlal Industries Ltd., case, referred supra, and has come to the conclusion that the invocation of limitation by the Original Authority was legal and justified.

9. At this juncture, it would be appropriate to sum up the basic grounds canvassed by the Appellant and juxtapose with the propositions and decisions of Hon'ble Supreme Court in the case of M/s Mafatlal Industries Ltd. Essentially the appellants are claiming that excess payment was on account of "Mistake of Law", which they noticed on going through the clarificatory Circular issued by the Board in 2011. It is noted that the said Circular merely states that unless certain other auxiliary services like measurements etc., are not completed, it would not be possible for the service provider to issue invoices to the recipient and therefore till that time it should not be considered as completed service. However, it is an admitted

fact that in this case the assessee had been issuing invoices on regular basis, apparently based on certain measurements and based in terms of the agreement with M/s HPCL and the same were being honoured and paid by M/s HPCL. In fact, in terms of the claim filed by the Appellant against M/s HPCL, which is now pending in the arbitration, the invoices were to be issued on the monthly basis by the Appellant to M/s HPCL. (para 5.6 of the statement of claim annexed to the appeal memo as Annexure 12 refers). Thus the Circular is of no help in so far as to conclude that their services were not completed and hence they were not liable to pay any service tax as admittedly they had been issuing on regular basis after quantifying the value of service and getting paid as well. Therefore, merely because some of the invoices were disputed, which is now a subject matter of arbitration, it cannot be said that levy as well as payment of service tax by the Appellant were totally illegal or without the authority of law.

10. In the case of M/s Mafatlal Industries Ltd., Hon'ble Supreme Court has inter alia, observed and held that unless there is any refund becoming due on account of unconstitutionality of the statutory provisions or on account of mistake of law or if it is patently "illegal levy", the refund to any amount paid as service tax or otherwise would required to be preferred in accordance with the provisions under Section 11B of the Central Excise Act. The constitutional validity under Section 11B was also upheld. Thus, only under specific circumstances like "unconstitutionality, illegal levy, mistake of law'' etc., a person can take recourse to writ jurisdiction or Contracts Act etc., where the limitation under Section 11B would not be applicable. For the reasons already discussed supra the refund in this case would squarely be covered by Section 11B as made applicable by Section 83 of Finance Act and therefore if the refund was not filed within the time period prescribed from the relevant date, the refund itself becomes non maintenable irrespective of the merit of the case.

11. The case cited by Learned DR is also not squarely applicable in the present case in as much as, the issue here is not whether the granting of refund under Section 11B was beyond the scope of the Act itself or that of jurisdiction. The facts are also not identical. As discussed in foregoing paras, it is not a case of mistake of law or unconstitutionality of any provision under which it has been levied and therefore any such refund has to be decided within the scope of the Act itself. Keeping in view the judgment of Hon'ble Supreme Court in Mafatlal Industries Ltd., & Others

case, the provisions under Section 11B is wide and exhaustive and covers all possible situations where excise duty or service tax paid including erroneously paid, can be refunded. However, this is subject to rigors of limitation prescribed under the law itself before it is examined on merit.

12. In view of above, the order of Commissioner of Central Tax(Appeals) is liable to be upheld on the grounds of limitation itself and appeal filed by the Appellant is liable to be dismissed. As regards other observations of the Original Authority, rejecting the refund claim, it is observed that the Original Authority has denied the claim on account of limitations under Section 11B itself, and in addition, has also made certain other observations like lack of jurisdiction, lack of merit, prone to unjust enrichment whereas Commissioner (Appeals) has rejected the appeals of the appellant, only on the ground of limitation under Section 11B. It is apparent that once the Original Authority as well as Appellate Authority has rejected the appeal on ground of limitation itself assuming the jurisdiction under the statute in Finance Act 1994, the other observations and grounds given in the Order-in-Original becomes superfluous and thus infructuous. In fact, appellant have themselves preferred the appeal under the provisions of the Central Excise Act/Finance Act 1994 and have not raised the point that it was not under the jurisdiction of Commissioner of Central Tax (Appeals) or CESTAT to decide the matter.

13. Appeal filed by the M/s Aegis Logistics Ltd., is dismissed.

(Dictated and pronounced in open court)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

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