CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH AT HYDERABAD

Division Bench

Court – I

Service Tax Appeal No. 2039 of 2011

(Arising out of Order-in-Appeal No. 08/2011 (G) ST dt.28.01.2011 passed by Commissioner of Customs, Central Excise & Service Tax, Guntur)

AV Rambabu Infra Pvt Ltd
Jawahar Nagar Colony, Markapur,
Prakasam Dist., AP – 523 316 **......Appellant**

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Guntur
Kannavarithota, Guntur,
Andhra Pradesh – 522 004 **......Respondent**

and

Service Tax Appeal No. 2040 of 2011

(Arising out of Order-in-Appeal No. 07/2011 (G) ST dt.28.01.2011 passed by Commissioner of Customs, Central Excise & Service Tax, Guntur)

AV Rambabu, Special Class Contractors
Jawahar Nagar Colony, Markapur,
Prakasam Dist., AP – 523 316 **......Appellant**

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Guntur
Kannavarithota, Guntur,
Andhra Pradesh – 522 004 **......Respondent**

Appearance
Shri K.A.S.V. Prasad, Advocate for the Appellant.
Shri V.R. Pavan Kumar, AR for the Respondent.

Coram:
HON'BLE MR. R. MURALIDHAR (JUDICIAL)
HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30136-30137/2023

Date of Hearing: 30.05.2023
Date of Decision: 30.05.2023

[Order per: R. MURALIDHAR]

The Appellant has been providing the services of Works Contract/ EPC for various water supply improvement schemes announced by the

Government of Andhra Pradesh. While such services are exempt from Service Tax payment, the client i.e., Executive Engineer, Public Health Division, Tirupati, used to deduct Service Tax component from the bills raised by the Appellant and insisted on the Appellant to pay the same to the Department. The Appellant had submitted to their client that no Service Tax is required to be paid in respect of these projects as the Works Contract activities are being taken up on account of public welfare and no commercial construction activities were being undertaken by them. However, the client has deducted Rs.40,95,717/- and Rs.56,64,889/- under various bills and remitted the same to the Service Tax Department. The Appellants have filed refund claim seeking refund of Rs.40,95,171/- and Rs.56,64,889/- on the ground that no Service Tax was payable for the activities undertaken by them. They submitted that the client has deducted the amount from the bills raised by the Appellant and insisted on the same being remitted to the Revenue Department directly. Therefore, the remittance has resulted in payments by the Appellant, where no Service Tax is payable.

2. After receiving the refund claim, the Department has rejected the refund claim vide Order No. 36/2010 ST (R) dt.19.07.2010 and Order No. 26/2010 (G) ST dt.28.01.2011. Being aggrieved by the impugned OIO, the Appellant is before the Tribunal.

3. The learned Counsel submits that though they have provided the copies of the GAR-7 Challans showing the date of actual remittance towards the Service Tax paid to the Department, the OIO has been passed on the ground that the refund claim was filed beyond a period of one year and the Department has also taken the ground of unjust enrichment at the OIO stage without issuing SCN.

4. The learned Counsel submits that the Department has gone by date of deduction of the amount by the client and not by the date of actual remittance by way of GAR-7 Challans to come to the conclusion that the refund claim was filed beyond the permissible period of one year. The details of the amounts released by the client and remitted to the Department are as under:

Date of cheque given by the client	Date of GAR-7 Challan remittance	Amount
05.03.2009	03.04.2009	Rs. 16,56,240/-
31.03.2009	15.04.2009	Rs.17,76,304/-
18.03.2009	31.03.2009	Rs.20,23,237/-
18.03.2009	31.03.2009	Rs.2,09,905/-

5. The refund claims were filed on 31.03.2010. From the above Table, it can be seen that in the first two cases, the refund claims were filed well before the one year period. In the 3rd and 4th case, though the refund claim was filed on 31.03.2010, since the date of limitation, if any, will start from the next date, even in these cases the refund claim has been filed within one year.

6. In respect of the second Appeal for Rs.56,64,889/-, the same was rejected only on account of unjust enrichment clause and there is no dispute that it was filed after one year.

7. He further submits that since the amount has been directly deducted by the client and this amount was paid by way of GAR-7 Challans to the Revenue Department, there is absolutely no possibility of the Appellant deriving any 'unjust enrichment' if the refund is granted to them. On a query as to whether the grounds of 'time bar' as well as 'unjust enrichment' clause were raised by the Department in the SCN issued, the learned Counsel submits that no SCN was issued to the Appellant before passing the OIOs, which amounts to denial of natural justice to them. In view of the above submissions, he prays that the Appeals may be allowed and they may be granted consequential relief.

8. The learned AR submits that though no SCN was issued, the Appellant was granted Personal Hearing and the submissions made by them therein was taken up into account. He reiterates the findings of the Adjudicating Authority to submit that refund claims were rejected correctly.

9. Heard both sides.

10. As can be seen from the records, the Appellant has been made to pay the Service Tax by their client. It is also on record that on similar projects pertaining to 17 other projects executed by them for Government of Andhra

Pradesh no Service Tax was paid by them. It is also not in dispute that the Department has not initiated any action to recover any Service Tax in respect of other 17 projects undertaken by the Appellant. Therefore, admittedly, the Department also agrees that these projects are fully exempt from payment of Service Tax. Now coming to the refund claims filed by the Appellant, it is clear that even though no Service Tax was payable the same was paid only on account of the withholding of the same by the client. Therefore, the amount paid by them by way of GAR-7 Challans cannot be considered as Service Tax paid by them. Therefore, when the amount has been paid by mistake (in this case only on the insistence of the client) the same cannot be treated as Service Tax paid. In such cases, Section 11B of Central Excise Act, 1944 will not be applicable as held in the case of CCE, Bangalore vs KVR Construction [2012 (26) STR 195 (Kar.)]. The relevant portion is extracted below:

> *"19. According to the appellant, the very fact that said amounts are paid as service tax under Finance Act, 1994 and also filing of an application in Form-R of the Central Excise Act would indicate that the applicant was intending to claim refund of the duty with reference to Section 11B, therefore, now it is not open to him to go back and say that it was not refund of duty. No doubt in the present case, Form-R was used by the applicant to claim refund. It is the very case of the petitioner that they were exempted from payment of such service tax by virtue of circular dated 17-9-2004 and this is not denied by the Department and it is not even denying the nature of construction/services rendered by the petitioner was exempted from to payment of Service Tax. What one has to see is whether the amount paid by petitioner under mistaken notion was payable by the petitioner. <u>Though under Finance Act, 1994 such service tax was payable by virtue of notification, they were not liable to pay, as there was exemption to pay such tax because of the nature of the institution for which they have made construction and rendered services. In other words, if the respondent had not paid those amounts, the authority could not have demanded the petitioner to make such payment. In other words, authority lacked authority to levy and collect such service tax. Incase, the department were to demand such payments, petitioner could have challenged it as unconstitutional and without authority of law. If we look at the converse, we find mere payment of amount, would not authorize the department to regularise such payment. When once the department had no authority to demand service tax from the respondent because of its circular dated 17-9-2004, the payment made by the respondent company would not partake the character of "service tax" liable to be paid by them. Therefore, mere payment made by the respondent will neither validate the nature of payment nor the nature of transaction. In other words, mere payment of amount would not make it a "service tax" payable by them. When once there is lack of authority to demand "service tax" from the respondent company, the department</u>*

> *lacks authority to levy and collect such amount. Therefore, it would go beyond their purview to collect such amount. When once there is lack of authority to collect such service tax by the appellant, it would not give them the authority to retain the amount paid by the petitioner, which was initially not payable by them. Therefore, mere nomenclature will not be an embargo on the right of the petitioner to demand refund of payment made by them under mistaken notion." [Emphasis supplied]*

11. Viewing this from another angle, considering the Department's allegations, which in any case, are not maintainable, it is on record that the amounts were deducted from their bills and the client had forced the Appellant to make the remittance to the Government. In such a case, when it is clear that no amount was recovered from the client and this amount has been remitted by way of GAR-7 Challans, there is no possibility of any unjust enrichment accruing to the Appellant, if refund claim is sanctioned.

12. Coming to the aspect of non-serving of SCN, it has been held by Hon'ble High Court and Hon'ble Supreme Court in catena of decisions that by not issuing the SCN the entire proceedings are rendered vitiated. In this case, the Appellant was not put to notice as to on what count the refund claim was sought to be rejected. In such case, the Appellant had attended the Personal Hearing without even being aware as to on what ground he is being granted Personal Hearing. The Learned AR's submission that opportunity given for Personal Hearing is only a lame excuse for the error of non issuance of Show Cause Notice. The Adjudicating Authority has failed to follow the principles of natural justice and even the Commissioner (Appeals) has remained silent on this issue. The impugned Order is liable to be set aside even on this count.

13. In view of the foregoing, we allow the Appeals with consequential relief.

(Operative Part of the Order was pronounced in the Open Court)

(R. MURALIDHAR)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

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