

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL,
KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.75886 of 2019

(Arising out of Order-in-Appeal No.291/SLG-ST/2018-19 dated 09.01.2019 passed by Commissioner (Appeals), Siliguri)

M/s Pecon Service Pvt. Ltd.

(Hill Court Road, Siliguri, West Bengal Pin-734001)

...Appellant

VERSUS

Commissioner of CGST & CX, Siliguri Commissionerate

(35, Sarat Bose Road, Hakimpura, Siliguri, Pin-734 001.)

...Respondent

APPEARANCE :

Shri Sushil Kumar Goyal, CA, For the Appellant

Shri P.K. Ghosh, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)

Final Order No.....75942/2023

DATE OF HEARING : 27 June 2023

DATE OF DECISION : 27 June 2023

PER R. MURALIDHAR:

Against the demand of the Adjudicating Authority, the Commissioner (Appeals), vide O.I.A. No. 291/SLG-ST/2018-19 dated 09.01.2019 passed an order allowing the appeal filed by the appellant. Aggrieved by the O.I.A Department filed an appeal before the Tribunal. However, subsequently, in view of the National Litigation Policy, the Department withdrew the appeal and vide final Order No.FO/A7561/16, Dated 28.07.2016 Department Appeal was dismissed as withdrawn. Effectively it means that Commissioner (Appeals) O.I.A dated 24.03.2010 has reached finality. Because of this, the appellant was not required to pay the Service Tax. Subsequently the appellant filed a refund claim for Rs.3,95,085/-, which they had paid when the appeal was pending before the Tribunal, in view of Supreme Court adverse judgement on this issue. After due process, the lower authorities have rejected the refund. Therefore, the appellant is before the Tribunal.

2. The Ld. Counsel submits that the only ground which the refund claim was rejected by the lower authorities was that the Service Tax was not paid 'under protest'. He submits that similar issues have come up before this Tribunal in the case of appellant's sister concerns. The Tribunal has held that the appellant is eligible to get the refund. He submits that present appeal may be allowed.

3. The Ld. AR submits that the appellant has paid the Service Tax after the order of Supreme Court and this payment was done in the normal

course without any remark that the Service Tax is being paid “under protest”. He reiterates the findings of the lower authority and justifies the refund claim rejected by them.

4. Heard both sides had considered the documentary evidence and submissions. The present facts of the case are identical when the same is compared with the decision of this Tribunal in the case of Pecon Service Limited v. Commr. of CGST & CX, Siliguri in the Final Order No. 75558 dated 6.06.2023, wherein this Bench has held as under:

6. *At the time when the Id. Commissioner (Appeals) passed the order for dropping the proceedings against the appellant, the decision of the Hon’ble Apex Court was not available. Therefore, the appellant was not liable to pay any service tax for the impugned period. Moreover, the appeal filed by the Revenue against the order of the Id. Commissioner (Appeals) has already been withdrawn under National Litigation Policy on 27.02.2016, thereafter, no demand is sustainable against the appellant and the amount paid by the appellant on 26.02.2011 is only a deposit. In view of this, no limitation is applicable. Further, no bar of unjust enrichment is applicable in the facts and circumstances of this case, as the appellant has also made the payment for the period from 10.09.2004 to 15.06.2005 on 26.02.2011.*

8. *Accordingly, I do not find any merit in the impugned order and the same is set aside.*

9. *In the result, the appeal is allowed with consequential relief, if any. Cross objection also gets disposed off.*

5. So far as, the Department's contention that the appellant has not made that the payment of Service Tax made 'under protest', the Tribunals have been consistently holding that once the appellant contests the issue by filing an appeal defending their case, that itself is sufficient to point that the issue is being contested by them. In such cases it has been held that the amount paid is to be treated as paid "under Protest".

6. This Tribunal in the case of Pecon Computers Pvt. Ltd V. CGST, Siliguri vide Final Order No.75558/2023 dated 06/06/2023 has held as under:

6. *At the time when the Id. Commissioner (Appeals) passed the order for dropping the proceedings against the appellant, the decision of the Hon'ble Apex Court was not available. Therefore, the appellant was not liable to pay any service tax for the impugned period. Moreover, the appeal filed by the Revenue against the order of the Id. Commissioner (Appeals) has already been withdrawn under National Litigation Policy on 27.02.2016, thereafter, no demand is sustainable against the appellant and the amount paid by the appellant on 26.02.2011 is only a deposit. In view of this, no*

limitation is applicable. Further, no bar of unjust enrichment is applicable in the facts and circumstances of this case, as the appellant has also made the payment for the period from 10.09.2004 to 15.06.2005 on 26.02.2011.

7. Since the issue involved is identical in the present case, following the above decision of this Bench, I allow the Appeal, with consequential relief, if any, as per law.

(Dictated and pronounced in the open court.)

Sd/-

(R. Muralidhar)
Member (Judicial)

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