

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

REGIONAL BENCH - COURT NO.1

Service Tax Appeal No.75398 of 2016

(Arising out of Order-in-Appeal No.30-35/ST-II/KOL/2015 dated 15.12.2015 passed by Commissioner of Central Excise, Appeals-II, Kolkata.)

M/s. Ramky Infrastructure Limited

(4th Floor, Block-A, Jindal Towers, 21/1/A/3, Darga Road, Kolkata-700017.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Kolkata-II

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata.)

APPEARANCE

Shri G.Natarajan, Advocate for the Appellant (s)

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

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)

HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 76569/2023

DATE OF HEARING : 30 August 2023

DATE OF DECISION : 30 August 2023

Per : ASHOK JINDAL :

The appellant is in appeal against the impugned order rejecting their refund claim.

2. Today, the application for early hearing of the appeal was listed before us, wherein the Ld.Counsel for the appellant submits that the connected appeals where the amount of refund was less than Rs.50.00 Lakhs have already been decided by this Tribunal vide Order dated 21.03.2017, therefore, the appellant sought early hearing in this matter, the early hearing of the appeal was allowed by this Tribunal and with the consent of both the sides, the appeal has been taken up for disposal today itself.

3. The facts of the case are that the appellant has filed refund claim in respect of service tax paid by them under 'works contract service' for the various works executed by them for the Govt. of West Bengal and its various agencies for laying of pipelines for water supply, sewerage lines etc.. It is the case of the appellant that they are not liable to pay service tax. The refund claims were rejected by the adjudicating authority on the ground of time bar and unjust enrichment and the appellant had availed abatement benefit and accordingly they are not entitled to refund under the 'works contract service'. The Ld.Commissioner(Appeals) remanded the matter back to the adjudicating authority. Against the said order, the appellant is before us.

4. The Ld.Counsel for the appellant submits that in their own case for the earlier period, wherein the amount was less than Rs.50.00 Lakhs, this Tribunal vide Final Order No.75741-75475/2017 dated 21.03.2017 has allowed their refund claims, therefore, the refund claim is to be allowed.

5. On the other hand, the Ld.AR for the department submits that in their own case for the other connected appeals, refund has already been allowed and against the said order, no appeal has been filed by the revenue.

6. Heard the parties.

7. Considering the fact that the issue has already been decided in favour of the appellant, wherein this Tribunal observed as under:-

"2. The Id.Counsel appearing on behalf of the appellant company filed written submissions and also compilation of work orders, sample invoices and copy of decisions relied upon. He contended that the show cause notices issued for rejection of the refund claims as time bar, which is contested by the appellant on the ground that they are not liable to pay any Service Tax and the amounts paid under mistake of law should not be treated as Service tax and accordingly the provisions under Section 11B of the Central Excise Act, 1944 would not apply on the aspect of time bar. It is also the case of the appellant that the lower authority has not recorded any findings in this regard which would

mean that he has accepted the plea raised by the appellant. Further, the Revenue was not in appeal before the First Appellate Authority on the plea of time bar. The Ld.Advocate further contended that the First Appellate Authority was not justified in observing that if the refund was time bar, the same should have been transferred to the Consumer Welfare Fund. In support of his submissions he relied upon the decision of the Hon'ble High Court of Karnataka in CCE (Appeals), Bangalore v. KVR Construction [2012 (26) STR 195 (Kar.)]. Further Id.Advocate vehemently argued that once there is no Service Tax liability, the amount paid by the appellant under mistake of law would only remain as a deposit with the Government and the provisions of Section 11B of the Central Excise Act on the aspect of time bar would not apply to the claim of refund of such deposits since the amount is retained by the Government without the authority of law. He has also relied on the decision of Hon'ble High Court of Kerala in the case of Geojit BNP Paribas Financial Services Ltd. v. CCE, Cus & ST, Kochi [2015 (39) STR 706 (Ker.)].

3. *On the aspect of unjust enrichment, the Id.Advocate submitted that invariably all the work orders awarded by the Government would contain a clause that the prices quoted and accepted is inclusive of all taxes. He filed sample copies of such work orders. He also categorically stated that no amount was collected by the appellant as Service Tax by indicating the same separately as could be observed from the copies of invoices/RA Bills. This would refer to all those taxes which are payable. If Service Tax is not at all payable for the contract, it cannot be presumed that the contract price is inclusive of Service Tax also. At the relevant point of time since there were widespread confusion as to the applicability of Service Tax on 'works contract', the appellant by way of abundant caution paid Service Tax by calculating the liability on cum duty basis. Once it is held that the subject activities would not at all be liable to Service Tax, the appellant could not be denied the right to claim refund of the Service Tax paid. In support of his submissions he relied upon the decision of Hon'ble High Court of Calcutta in the case of CCE, Calcutta-III v. Panihati Rubber Ltd. [2004 (172) ELT 310 (Cal.)] and the decisions of the Tribunal in the cases of Amadalavalasa Cooperative Sugars Ltd. v. CCE, Visakhapatnam [2009 (15) STR 501*

(Tri.-Bang.)] and Smithkline Beecham Consumer Health Care Ltd. v. CCE, Hyderabad [2007 (220) ELT 133 (Tri.-Chennai)].”

And this Tribunal in that order has observed that –

"6. I find from the record that there is no dispute that the Service Tax was collected wrongly from the appellant during the period 2007-08 and 2008-09. Both the authorities below denied the refund claim on the ground that a part of the refund claim is barred by limitation beyond the period of one year from the date of deposit of Service tax as evident from GAR-7 chalans. The Id.Counsel referred to the decision of the Hon'ble Karnataka High Court in the case of Commr. of C.Ex. (Appeals), Bangalore v. KVR Construction [2012 (26) S.T.R. 195 (Kar.)], where the appeals filed by the Revenue was dismissed. In that case, Service Tax was paid mistakenly on construction service. After considering the decision of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. v. Union of India [1997 (89) E.L.T. 247 (SC)], the appeal filed by the Revenue was dismissed. It has been held as under:-

"15. We are not concerned with the other conditions of Section 11B of the Act because it is not the case of the appellant Department that the burden of service tax was passed on to any other person. As a matter of fact, the controversy in this appeal revolves around the maintainability of the very application filed under Section 11B of the Central Excise Act and whether Sec. 11 applies to the facts of the present case at all. In the case of Mafatlal Industries Ltd. v. Union of India (supra), the question was with regard to the refund of Central Excise and Customs Duties. It was held that all claims except where levy is held to be unconstitutional, is to be preferred and adjudicated upon under Section 11B of the Central Excise Act, 1944 or under Section 27 of the Customs Act, 1962 and subject to claimant establishing that burden of duty has not been passed on to a third party. In such circumstances, it was held, no civil suit for refund of duty is maintainable. It also observes that writ jurisdiction of High Courts under Article 226 and of Supreme Court under Article 32 remains unaffected by the provisions of

Section 11B of the Act. It was further held that concerned Court while exercising the jurisdiction under the said articles, will have due regard to the legislative intent manifested by the provisions of the Act and the writ petition would naturally be considered and disposed of in the light of the provisions of Section 11B of the Act. It has been held therein that power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it, as the power under Article 226 is conceived to serve the ends of law and not to transgress them. At paragraph 113 of the said judgment, they classify the various refund claims into three groups or categories :

(a) The levy is unconstitutional-outside the provisions of the (I) Act or not contemplated by the Act.

(b) The levy is based on misconstruction or wrong or erroneous (II) Interpretation of the relevant provisions of the Act, Rules or Notifications: or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the fundamental principles of judicial procedure.

(c) Mistake of law - the levy or imposition was (III) unconstitutional or illegal or not exigible in law (without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee either by the High Court or the Supreme Court, and as soon as the assessee came to know of the judgment (within the period of limitation), he initiated action for refund of the tax paid by him, due to mistake of law.

After referring several judgments and provisions of Section 11A & 11B of Central Excise Act, at paragraph 137 of the said judgment, their Lordships have concluded as under :

"137. Applying the law laid down in the decisions aforesaid, it is not possible to conclude that any and

every claim for refund of illegal/unauthorized levy of tax can be made only in accordance with the provisions of the Act (Rule 11, Section 11B etc. as the case may be), and an action by way of suit or writ petition under Article 226 will not be maintainable under any circumstances. An action by way of suit or a petition under Article 226 of the constitution is maintainable to assail the levy or order which is illegal, void or unauthorized or without jurisdiction and/or claim refund, in cases covered by propositions No. (1), (3), (4) and (5) in Dulalbhai's case, as explained hereinabove, as one passed outside the Act and ultra vires. Such action will be governed by the general law and the procedure and period of limitation provided by the specific statute will have no application (Collector of Central Excise, Chandigarh) M/s. Doaba Co-operative Sugar Mills Ltd., Jalandhar [1988 (37) E.L.T. 487 (S.C.) = 1988 Supp. SCC 683]; Escorts Ltd. v. Union of India & Ors. [1994 Supp (3) SCC 86] Rule 11 before and after amendment, or Section 11B cannot affect Section 72 of the Contract Act or the provisions of Limitation Act in such situations. My answer to the claims for refund broadly falling under the three groups of categories enumerated in paragraph 6 of this judgment is as follows :

Where the levy is unconstitutional - outside the category (I) provisions of the Act or not contemplated by the Act -

In such cases, the jurisdiction of the civil courts is not barred. The aggrieved party can invoke Section 72 of the Contract Act, file a suit or a petition under Article 226 of the Constitution and pray for appropriate relief inclusive of refund within the period of limitation provided by the appropriate law. (Dulabhai's case (supra) - para 32 - clauses (3) and (4)."

23. Now we are faced with a similar situation where the claim of the respondent/assessee is on the ground that they have paid the amount by mistake and therefore they are entitled for the refund of the said amount. If we consider this payment as service tax and duty payable, automatically, Section 11B would be applicable. When once there was no compulsion or duty cast to pay this service tax, the amount of Rs. 1,23,96,948/- paid by petitioner under mistaken notion, would not be a duty or "service tax" payable in law. Therefore, once it is not payable in law there was no authority for the department to retain such amount. By any stretch of imagination, it will not amount to duty of excise to attract Section 11B. Therefore, it is outside the purview of Section 11B of the Act.

24. The learned Counsel for the appellant has also contended that when the order of refund was rejected, the respondent could have approached this Court instead of filing the appeal choosing a wrong forum, could not be a deficit coming in the way to claim refund.

25. However, the petitioner has not approached the Tribunal after the order passed by 1st appellate authority and they have approached this Court. Therefore, even the provisions of Section 35B(1)(b) would not be applicable. From the facts of the case as discussed herein above, it emerges that petitioner has approached this Court contending that Section 11B is not applicable as there was no duty cast on them to pay "service tax" and they have paid such amount under mistaken notion. Viewed from nay angle, we are of the opinion that the learned Single Judge was justified in setting aside that portion of the order which rejected the claim of refund and accordingly same is confirmed.

7. In the case of *Jubilant Enterprises Pvt.Ltd. v. Commissioner of C.Ex., Mumbai-I* [2014 (35) S.T.R. 430 (Tri.-Mumbai)] the Tribunal allowed the appeal on the identical situation. The relevant portion of the said decision is reproduced below:-

"6. *In this case, the appellant has paid service tax during the impugned period for which they are not required to pay service tax at all as clarified by C.B.E. & C. As the payment made by the appellant is not of service tax, therefore, as held by this Tribunal in the case of Shankar Ramchandra Auctioneers (supra) the provisions of Section 11B of the Central Excise Act are not applicable. Therefore, the refund claim filed by the appellant is not time-barred. The case law relied upon by the Id. AR in Mafatlal Inds. (supra) is not relevant to the facts of this case.*

7. *In these circumstances, I hold that the appellant are entitled for refund claim as filed in time and the provisions of Section 11B of the Central Excise Act, 1944 are not applicable to the facts of this case. Accordingly, impugned order is set aside. Appeal is allowed with consequential relief. The Adjudicating Authority is directed to implement the order within 30 days of the communication of the same."*

8. *In the case of Commr. of C.Ex., Pune-III v. Shankar Ramchandra Auctioneers [2010 (19) S.T.R. 222 (Tri.-Mumbai)], the Tribunal dismissed the appeal filed by the Revenue. It has been held as under:-*

"8. *Now, I come to the second issue. The learned DR submitted that refund claim is barred by limitation as it has been filed beyond the period of limitation and to support this contention, he placed reliance on Jumax Foam Pvt. Ltd. (supra) and Karnik Maritime Pvt. Ltd. (supra). In this case, they paid tax voluntarily, no protest was lodged and they have recovered the service tax also from their clients. In the case of Beharay & Rathu Constructions (supra), the respondents were the recipient of the Goods Transport Agency service and in that case they have claimed abatement. In the case of Jumax Foam Pvt. Ltd. (supra), the appellants filed the refund claim of the excess Service Tax paid by them. In such a situation, the facts are not similar to this case. In the case of Hexacom (I) Ltd. v. Commissioner of Central Excise, Jaipur - [2006 \(3\) S.T.R. 131](#) (Tribunal) = [2003 \(156\) E.L.T. 357](#) (Tri.-Del.), this Tribunal has*

held that if any amounts are collected erroneously as representing service tax, which is not in force, there is no bar to return of such amounts. Further, in the case of CCE, Jaipur-I v. Jai Laxmi Finance Co. - [2006 \(3\) S.T.R. 25](#) (Tri.-Del.), this Tribunal had again held that the amount collected without authority of law, the assessee is eligible for refund. In this case also, prior to 1-5-2006, the provisions of Service Tax were not applicable on the respondents and the amount paid as Service Tax was not payable by them at all. In that situation, the provisions of Section 11B of Central Excise Act, 1944 extended to the Service Tax are not applicable to this case. Hence, the bar of limitation is not applicable to this case.

9. *Now, I come to the third issue. I find that in this case the respondent has filed the refund claim for the amount, which they paid the Service Tax to the department, but they have not received the same from their clients. Moreover, this fact has been corroborated by their balance-sheet showing that the amount is receivable from the Central Excise and Chartered Accountant has also given a certificate to that effect. In this situation, the respondent has qualified the bar of unjust enrichment and the same is not applicable in this case."*

9. *In the case of Geojit BNP Paribas Financial Services Ltd. v. C.C.E., CUS & S.T., Kochi [2015 (39) S.T.R. 706 (Ker.)], the Hon'ble High Court of Kerala allowed the appeal filed by the assessee after considering the decision of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. (supra). The relevant portion of the said decision is reproduced below:-*

"8. *The learned counsel for the Department, relying on the judgment of the Hon'ble Supreme Court in Mafatlal Industries Ltd. and Others v. Union of India and Others [(1997) 5 SCC 536 = [1997 \(89\) E.L.T. 247](#) (S.C.)] would argue that even if the payment was made under a mistake, the refund can only be processed in terms of Section 11B of the Central Excise Act. In the above case, the Apex Court elaborately classified claim for*

refund into three groups or categories, vis-à-vis, (i) unconstitutional levy, (ii) illegal levy, and (iii) mistake of law, and held that the remedies involved in all the three categories are the remedies provided under the Excise and Customs Act. None of the above categories would attract to the case in hand. In this case, the levy was purely on account of mistake of fact in understanding the law. The petitioner assumed that the transaction for which he has paid tax, is covered under the law. The law does not cover such transaction for payment of Service Tax. Therefore, it is not on account of any mistake of law but mistake of fact the Service Tax was paid. In that view of the matter it has no colour of tax for the purpose of levy by the Department. The distinguishing feature for attracting the provisions under Section 11B is that the levy should have the colour of validity when it was paid and only consequent upon interpretation of law or adjudication, the levy is liable to be ordered as refund. When payment was effected, if it has no colour of legality, Section 11B is not attracted. This Court is also of the view that levy is not in accordance with the provisions of the Service Tax and therefore, such payment cannot be taken as a payment made relatable to Section 11B of the Central Excise Act."

10. *In the case of Hexacom (I) Ltd. v. Commissioner of Central Excise, Jaipur [2003 (156) E.L.T. 357 (Tri.-Del.)], the Tribunal on the identical issue allowed the appeal filed by the assessee. The relevant portion of the said decision is reproduced below:-*

"The issue raised in this appeal relates to refund of amount paid by the appellants by way of "service tax" on leased circuits. The appellant is a cellular operator who leases circuits from the DOT for the purpose of running the cellular services. In addition to lease charges, the appellants were charged with service tax also by the DOT for the periods 1998-99 and 1999-2000. Subsequently, on revision of lease charges retrospectively, DOT returned the excess amount collected towards lease charges; but did not return the service tax collected on the ground that those amounts have been deposited with service tax authorities.

The appellants have, therefore, claimed the amount of service tax paid from the Central Excise Authorities. The lower authorities have rejected the claim on the ground that the refund of the service tax would amount to unjust enrichment.

2. We have perused the records and heard both sides. It is not in dispute that no service tax was leviable during the period in question. Therefore, whatever payment was made did not relate to service tax at all. It was merely an erroneous collection by DOT and payment by the appellants. Therefore, provisions relating to refund of service tax, including those relating to unjust enrichment, cannot have any application to the return of the amount in question. It is further noted that provisions contained in Section 11D of the Central Excise Act have not been made applicable to service tax. Therefore, if any amounts are collected erroneously as representing service tax, which is not in force, there is no bar to the return of such amounts. The rejection of refund application was, therefore, not correct."

11. Regarding unjust enrichment, the assessee sold the goods on a composite price inclusive of all duties, there is no question of unjust enrichment as has been held by the Tribunal in the case of *Himatsingka Seide Ltd. v. Commissioner of Customs, Bangalore* [2005 (191) E.L.T. 885 (Tri.-Bang.)]. The relevant portion of the said decision is reproduced below:-

"6. We have gone through the rival contentions. This is a case where de-bonded goods have sold. There is nothing wrong in the presumption of the Revenue that the duty burden is included in the sales price. But the error committed by the Revenue is in presuming that duty collected in excess of what is payable had been passed on to the buyers. Whenever there is a composite price inclusive of all duties, the meaning is that the price includes only the duty payable. We cannot presume that the excess duty paid by mistake is passed on to the buyer. The Hon'ble Tribunal in the case of *Cimmco Ltd. v. Collector of Central Excise, Jaipur* [[1999 \(107\) E.L.T. 246](#) (Tribunal)] had interpreted the term 'inclusive of all duties and tax' and it has

been held therein that condition in work order that the words 'inclusive of all duties, taxes ...' does not mean that excise duty is covered by it especially when appellant has been taking a stand from the beginning as to non-excisability of goods. It is worthwhile to briefly mention the facts of the case. In the above-mentioned case, the appellant had a contract with M/s. I.O.C. Ltd. for supply of 150 tank wagons; "for supply, fabrication and mounting of heating coils inside tank wagons for LSHS service". The contract covered 150 tank wagons. They applied for permission under Rule 173H of Central Excise Rules for bringing duty paid wagons and other duty paid materials for such fabrication job. After obtaining necessary permission from the Department, they executed the work and cleared the tank wagons on payment of duty, as demanded by the Department, under protest. Thereafter they claimed refund. The refund claim was rejected. But the Collector (Appeals) held that the process carried out by the appellants did not amount to manufacture and since the Assistant Commissioner had concluded that the goods are covered by Rule 173H, he should have been allowed clearance without payment of duty. In view of the favourable order, the appellants filed a refund claim for the consequential refund amount. But the claim was rejected on the ground of unjust enrichment. The Revenue relied on the work contract which indicates that the rates are inclusive of all taxes. The Tribunal interpreted the terms 'inclusive of all duties' and held that the provision that "the rates are inclusive of all duties" would not lead to the necessary presumptions or conclusion that excess duty should be held to have been covered or provided for. The price here was a lump sum amount and the usual condition that the rates are inclusive of all duties and taxes is only with a view to avoid any possibility of the supplier raising any demand at a later stage on the ground that certain duties are to be paid. The expression 'rates are inclusive of all duties and taxes' have to be understood as applicable to only duties and taxes which are payable. The Tribunal held in the above mentioned case that there is no unjust enrichment and the

appellants would be entitled to obtain refund. The ratio of the above case is clearly applicable here. In the present case also, the sale price, no doubt, includes all statutory levies payable. That means, after some time the seller should not come to the buyer for extra amounts on the plea that further duty has to be paid to the Department. The presumption that the sale price includes duty erroneously paid in excess has no basis. More precisely, the sale price includes only the duty payable. In these circumstances, there is no question of unjust enrichment. We allow the appeal with consequential relief."

12. The Tribunal in the case of *Amadalavalasa Cooperative Sugar's Ltd. v. CCE, Visakhapatnam* [2009 (15) S.T.R. 501 (Tri.-Bang.)] held that unjust enrichment is not applicable as the contract price is inclusive of duty and duty payable reduced or becomes zero is immaterial. The relevant portion of the said decision is reproduced below:-

"3. The learned consultant urged the following points :-

(1) Every purchase order received by the appellant is inclusive of excise duty. The pattern of invoicing by the assessee is to quote the assessable value after exclusion of Excise duty and arrive at the price by aggregating the two elements. This method of invoicing has apparently been adopted only in order to comply with the statutory requirement under Section 12A of the Central Excise Act, 1944.

(2) The following decisions have also been relied on :-

(a) *Commissioner v. Carona Cosmetics* [[2000 \(118\) E.L.T. 356](#)]

(b) *Swarup Fibre Industries v. Commr.* [[2000 \(120\) E.L.T. 510](#)]

(c) *ITC Bhadrachalam Paperboards Ltd. v. Commr.* [[2002 \(146\) E.L.T. 582](#)]

4. Learned JDR relied on the following decisions :-

- (i) *Lakhanpal National Ltd. v. CCE, Vadodara* [[2006 \(195\) E.L.T. 69](#) (Tri - Mum)]
- (ii) *SRF Ltd. v. CC, Chennai* [[2006 \(193\) E.L.T. 186](#) (Tri - LB)].

5. We have gone through the records of the case carefully. The issue is simple. The contract of the appellants with the buyer indicates that the price to be paid for the goods is inclusive of duty payable. Suppose the price is Rs. 100/- and if the duty payable is Rs. 20/- the appellants would show in the invoice two figures Rs. 80/- & Rs. 20/- to indicate the duty. Even from the beginning, the appellants took the stand that no duty is leviable on the scrap derived from old machinery. Since the department demanded duty, he paid the same and showed it in the invoice. Later, when it was held that the goods are not liable to duty, we cannot say that he passed on duty burden of Rs. 20/- to the buyer. Irrespective of the fact that the goods are dutiable or not the appellants would be charging Rs. 100/- only. When he pays duty, he gets lesser profit. In other words in a case like this, where the contract price is inclusive of duty payable there cannot be unjust enrichment even if the duty payable is either reduced or nil. The case laws relied on by the learned JCDR are not relevant. Hence, we allow the appeal with consequential relief.”

13. In the recent decision of the Division Bench of the Tribunal in the case of *M/s. Monnet International Ltd. & Another vs. CCE, New Delhi* by Final Order No.52170-52171/2017 dated 08.03.2017 allowed the appeal on the identical situation. In that case, the assessee was providing 'liaisoning services' to M/s. Dongfeng Electric Corpn., China during the period 01.06.2005 to 31.01.2007. They have deposited the amount of Rs.93,13,142/- in the first case and Rs.25,31,125/- in the second case in instalments towards Service Tax on 02.01.2008, they filed refund claim after knowing the fact that the 'liaisoning services' were not subject to Service Tax. The refund claims were rejected by the

lower authorities being time barred as per section 11B of the Central Excise Act, 1944. The Tribunal allowed the appeals filed by the assessee. It has been held as under:-

"14. *After considering the various case laws on the subject which are discussed in the above paragraphs, we come to the conclusion that Section 11B generally governs the claim for refund of duty and interest paid on such duty. The Section has been made applicable for service tax also. In the case of KVR Constructions (supra), the Hon'ble Kerala High Court has laid down yardsticks to decide those cases where Section 11B may not be applicable in service tax cases. The Hon'ble High Court has held that, if there is no authority to collect service tax by the department, it would not give them the authority to retain the amount paid which was initially not payable by them.*

15. *In the present case, the assessee-appellants were rendering "liaisoning service". The said services were not liable to Service Tax at the relevant time. Hence, the Department would not be in a position to collect service tax on the said activities since the same is not leviable. Consequently, in terms of the law laid down by the Hon'ble Kerala High Court (supra), the Government will have no authority to retain the said amount and will have to be refunded.*

16. *It may also be mentioned that in the case of Hind Agro Industries Limited (supra), we find that the Hon'ble Delhi High Court has circumscribed the above view by prescribing the period of three years, after discovery of the mistake, for claiming such refund.*

17. *Thus, we are of the view that in the instant case, the amount deposited by the assessee-appellants without any authority of law cannot be considered as Service Tax. As per Article 265 of the Constitution, no tax can be collected without any authority of law. At the relevant time, there was no authority of law to collect Service Tax on the activity carried out by the assessee-appellants. Hence, Section 11B of the Central*

Excise Act, 1944 is not applicable. The amount was deposited in the year 2006-07 and the refund was filed on 2nd January, 2008. Hence, the claim has been made within the period of three years prescribed by Hon'ble Delhi High Court. Therefore, we are of the view that the assessee-appellants are entitled to get the refund and the same is not hit by the limitation prescribed under Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

18. *Moreover, it may be mentioned that the Department should not take advantage of the ignorance of the assessee-appellants as per the ratio laid down in the case of Parekh Brothers v. CIT, 150 ITR 105 Kerala; and CIT v. Maha Laxmi Sugar Mills, 160 ITR 920 SC.*

19. *In the instant case, we are of the view that it is not a case of refund of tax, but return of deposit for which limitation (Section 11B of the Act) is not applicable. Hence, we set aside the impugned orders and direct the jurisdictional Commissioner to return the deposited amount, as per law.*

20. *In the result, both the appeals filed by the assessee-appellants are allowed."*

14. *On perusal of the above decisions of the Hon'ble High Court and the Tribunal, it is seen that the limitation under section 11B of the Central Excise Act would not be applicable in case of payment of tax mistakenly. Further, the principle of unjust enrichment would not apply in the case of composite contract price, as applicable in the present case. The Ld.A.R. on behalf of the Revenue strongly relied upon the decision of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. (supra). I find that the Hon'ble High court and the Tribunal, in various judicial decisions, after discussing the decision of the Hon'ble Supreme Court in the case of the Mafatlal Industries Ltd., (supra) held in favour of the assessee. In the present case, I do not find any reason to reject the refund claims after perusing the above decisions. I have also seen the sample invoices placed by the appellants. There is no dispute that the appellant is entitled to refund of payment of tax made*

by mistake. The various judicial authorities held that the refund should not be denied on the ground of time barred and unjust enrichment in such situation. Therefore, the appellant is entitled to get the refund of tax as claimed by them.

15. In view of the above discussion, the appeal filed by the appellant is allowed with consequential relief."

8. As the issue has already been decided by the Tribunal in favour of the appellant, therefore, we hold that the appellant is entitled for refund claim.

9. In view of this, we set aside the impugned order and allow the appeal with consequential relief, if any.

(Operative part of the order was pronounced in the open Court.)

Sd/

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)