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

Service Tax Appeal No. 208 of 2010

(Arising out of the Order-in-Appeal No. 39-40/ST/2010 dated 17.02.2010 passed by Commissioner of Central Excise (Appeal-I), Kolkata.)

M/s Nuovo Pignone International SRI,
(C/o Pricewaterhouse Coopers Private Limited, South city Pinnacle, 4th Floor, Plot-XI/I, Block EP, Sector-V, Salt Lake, Kolkata-700091.)

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Haldia,
15/1, Strand Road, Customs House, M.S. Building, Kolkata-700001.)

. ...**Respondent(s)**

APPERANCE :
Shri Prasad Paranjpe, Advocate for the Appellant
Shri K. Chowdhury, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...77756/2023

DATE OF HEARING : 28.11.2023
DATE OF DECISION : 28.11.2023

PER K. ANPAZHAKAN :

The present appeal has been filed by the Appellant M/s. Nuovo Pignone International SRL(formerly GE Nuovo Pignone), against the impugned Order-in-Appeal dated 17.02.2010, passed by Commissioner (Appeals), wherein the refund of Rs.2,74,28,487 along with interest claimed the Appellant was rejected.

2. Briefly stated facts of the case are that the Appellant had entered into Operations and Maintenance Agreement dated 03.07.1998 (O & M Agreement) with HPL Cogeneration Ltd.(HPLCL) for operation of a Power Plant set up by HPLCL on a Build, Own and Operate basis for generation of electricity and steam for captive use of Haldia Petrochemicals Limited (HPL) at its petrochemical complex in West Bengal. Under the terms of the O & M Agreement, the Appellant was

required to operate the Plant in such a manner so as to maximise the efficiency and output of the electricity and steam generated during the operation and maintenance period. The O & M Agreement envisaged provision of certain services during the pre-operational period which ended on 07.08.1999 as well as services of running the Power Plant during the operation period. The present dispute pertains to services rendered and consideration received during the operation period i.e. after the pre-operational period.

3. During the period July 2003 to October 2007, the Appellant rendered the services of operation of the plant and under the bonafide belief that such services are liable to service tax under the category of Consulting Engineering Service, paid service tax in two tranches as under:

Sr.No.	Period	Tax (Rs.)	Interest (Rs.)
1	Jul 2003 -Oct 2006	2,28,87,437	9,16,854
2	Mar 2007 – Oct 2007	45,41,050	2,57,985
	TOTAL	2,74,28,487	11,74,839
Grand Total		2,86,03,326	

4. Upon realizing that the services rendered by them under the O & M Agreement during the operations period would not be liable to service tax, the Appellant filed two separate refund applications dated 20.04.2007 and 27.02.2008. two Show Cause Notices (1st SCN and 2nd SCN) proposing to reject their refund application on the ground that services rendered by them during the operations period qualified as taxable Consulting Engineering Services and hence refund of tax and interest sought form them was not due to them. Both the lower authorities upheld the propositions in both the Show Cause Notices and rejected the refund claims filed by the Appellant. Hence the present appeal.

5. In their ground of appeal, the Appellant submits that the term 'Consulting Engineer' under Section 65 (31) of the Finance Act, 1994 is

defined *inter alia* to mean a service in the nature of advice, consultancy or technical assistance in any discipline of engineering provided by the service provider to the service recipient. In the present case they have entered into operations and maintenance contract with HPLCL under which they are obliged to operate, maintain and run the Power Plant to the desired efficiency. It is provided in the O & M Agreement that the Appellant is obliged to run the Power Plant at certain efficiency levels and achieving or not achieving those efficiency levels will result into the Appellant being rewarded with bonus or being imposed with liquidated damages as the case may be. This establishes that the Appellant themselves are liable to run the Power Plant for their own benefit and on its own account and they are not expected to provide any advice, consultancy, or technical assistance in any discipline of engineering to their clients HPLCL. Thus, the proposal to uphold the payment of service tax by them under the mistaken belief under the category of Consultancy Engineer's Service is incorrect in law and therefore they are rightfully entitled for the refund of tax and interest mistakenly paid by them.

6. The Ld. D.R submits that the Appellant themselves classified the services rendered by them under the category of 'Consulting Engineer service' and paid service tax. They filed returns also intimating the payment of service tax. Accordingly, he contended that the Appellant has rightly paid service tax and the hence the refund filed by them has been rightly rejected in the impugned order. Accordingly, he prayed for rejecting the appeal filed by the Appellant.

6. Heard both sides and perused the appeal documents.

7. We observe that the issue to be decided in the present appeal are:

(i) Whether the services rendered by the Appellant under the O & M Agreement during the operations period would be liable to service tax, under the category of 'Consulting Engineer service' or not.

(ii) Whether the Appellant is eligible for refund of service tax paid by them along with interest.

8. Regarding the liability of service tax under the category of 'Consulting Engineer service', we would like to examine the definition of 'Consulting Engineer Service'. As per Section 65 (31) of the Finance Act,

1994 , the term 'Consulting Engineer Service' would mean a service in the nature of advice, consultancy or technical assistance in any discipline of engineering provided by the service provider to the service recipient. In the present case, a perusal of the Operation Agreement entered by the Appellant with HPLCL reveal that the Appellant has not rendered any advice, consultancy or technical assistance in any discipline of engineering . The Appellant has entered into operations and maintenance contract with HPLCL under which the Appellant themselves are obliged to operate, maintain and run the Power Plant to the desired efficiency. A perusal of the Agreement reveal that the Appellant themselves are liable to run the Power Plant for their own benefit and on its own account and they are not expected to provide any advice, consultancy, or technical assistance in any discipline of engineering to their clients HPLCL, during the operation of the plant. Accordingly, we observe that the service rendered by them would not fall under the category of Consultancy Engineer's Service.

9. The Appellant has cited the decision of Rolls Royce Indus Power (I) Ltd – 2006 (3) STR 292 (T) in support of their contention that the services rendered under the O & M Agreement, is not liable to service tax. We observe that this decision cited by the Appellant is squarely applicable in this case.

10. In the case of Rolls Royce Indus Power (I) Ltd, the Tribunal has held as under:

> ***6.*** *We have perused the records and considered the submissions made by both sides. The issue raised is the true meaning and scope of operation and maintenance agreement dated 14-3-95. The appellant had taken over the plant and was operating & maintaining it in terms of the agreement. A perusal of the agreement makes it clear that it is a contract between owner and an operator. The terms of the contract vest complete freedom and responsibility on the appellant, without any interference by the owner. The owner's right is restricted to entry and access, to be satisfied that the operation is carried out according to standards. He also receives reports about the relevant aspects of operation, status and output. The payment for operation and maintenance are determined under the various clauses of the contract. In addition to the lump sum payment, it also provides for bonus and*

penalty. The terms of the contract do not envisage or involve providing any consulting or engineering help to the owner. The operator is fully autonomous and responsible for the performance of operation and maintenance. Whatever engineering issues are involved, it is for the operator to find solutions for, and attend to in the course of operation and maintenance. He is not required to render any advice or to take any orders from the owner. He cannot pass on the responsibility for operating the plant in any manner to the owner. Thus, there are no two parties, one giving advise and the other accepting it. Service tax is attracted only in a case involving rendering of service, in this case, engineering consultancy. That situation does not take place in the present case. Therefore, we are of the opinion that the duty demand raised is not sustainable. The learned SDR's contention about the 46th Amendment and the Apex Court's decision in Builders Association of India and Others (supra) have no application in the present case since such a deemed definition does not exist in the case of job work as has taken place in regard to project contracts in sales tax. In these facts and circumstances, the appeal is allowed after setting aside the impugned order.

11. Accordingly, by following the decision cited above, we hold that the services rendered by the Appellant are not liable to service tax under the category of 'Consulting Engineer Service.

12. The next issue to be decided is whether the Appellant is eligible for refund of service tax of Rs.2,74,28,487 paid by them along with interest. The Appellant cited the decision of *Commr. of C. E. (Appeals), Bangalore Vs. KVR Construction- 2012 (26) STR 195 (Kar.),wherein the Hon'ble High Court of Karnataka has held* that when the tax is paid under mistake, provisions of Section 11B of the Central Excise Act,1944 and the provisions of limitation and unjust enrichment would not be applicable. This Tribunal has relied upon the said decision in the case of Bansal Biscuits Pvt Ltd and held the same view vide Final Order dated17.11.2023. The relevant portion of the said decision of this Tribunal is reproduced below:

11. So far as the issue as to whether the refund is covered by time bar under Section 11B is concerned, in the case of Commr. of C. E.

(Appeals), Bangalore Vs. KVR Construction- 2012 (26) STR 195 (Kar.), High Court of Karnatka has held as under:-

> *22. In the case of Commissioner of Central Excise, Bangalore v. Motorola India Pvt. Ltd. (supra) the Division Bench of this Court considered similar issue. It was a case where excess amount was paid over duty under Central Excise Act on the direction of the Department. There was an application for refund of amount and the same came to be rejected by the Assistant Commissioner on the ground of lapse of time. It was confirmed by both the Appellate Authority and also the Tribunal. Aggrieved by the order of the Tribunal, revenue came up before the High Court. Their lordships of the Division Bench held that order of the Tribunal to allow the claim on the basis that amount paid by mistake cannot be termed as duty in the said case was justified and therefore applying the law laid down in the decision of Apex Court in the case of India Cements Ltd. v. Collector of Central Excise - 1989 (41) E.L.T. 358, dismissed the appeal.*
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> *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. [Emphasis supplied] Affirmed by Supreme Court as reported in Commissioner Vs.* ***KVR Construction reported in 2018 (14) G.S.T.L. J70 (S.C.).***

12. Similarly, in the following cases, the co-ordinate Benches have held that refund claims filed on account of Service Tax paid by mistake, are not governed by the time limit specified under Section 11B.

> *1. VenkatramanGuhaprasadVs. Commr. of GST & C. Ex., Chennai, 2020 (42) G.S.T.L. 124 (Tri.-Chennai)*
> *2. Commr. V. KVR Construction 2018 (14) G.S.T.L. J70 (S.C.)*
> *3. Parijat Construction Vs. Commr. of Central Excise, Nashik, 2018 (359) E.L.T. 113 (Bom.)*
> *4. 3E InfotechVs. CESTAT, Chennai, 2018 (18) G.S.T.L. 410 (Mad.) 5. Commr.ofC.Ex. (Appeals), Bangalore Vs. KVR Construction, 2012 (26) S.T.R. 195 (Kar.)*

13. Based on the decision of Third Member Reference Bench, the CESTAT, Hyderabad vide its Final Order No. A/30082/2022 dated 05/09/2022 in the Credible Engg. Construction Vs. CCE, Hyderabad, has held as under:-

> *" In view of the difference of opinion, the following questions arise for consideration by learned 3rd Member: (1) Whether the limitation prescribed under section 11B of the Central Excise Act will not be applicable as the tax was paid erroneously though eligible to exemption and as such is in the nature of deposit and hence limitation is not attracted as held by Member (Judicial) following the ruling of Hon'ble Karnataka High Court in KVR Construction affirmed by Hon'ble Supreme Court 2018(14) STR J17.*
>
> *39. The reference is accordingly, answered in the following manner: "The limitation prescribed under section 11B of the Excise Act would not be applicable if an amount is paid under a mistaken notion as it was not required to be paid towards any duty/tax."*

14. By relying on the decisions cited above, we hold that the tax in this case has been paid under mistake and hence the provisions of Section 11 B of the Central Excise Act,1944 and the provisions of limitation and unjust enrichment are not be applicable.

15. We also find that the time bar issue has not been raised in the Notice. This observation has been made by the adjudicating authority in the impugned order, which is reproduced below:

> "The other decisions relied upon by the applicant relates to time bar issue. I find that in the impugned Notice there is no allegation made in the time bar factor under Section 11B of the Central Excise Act, 1944. Therefore, I find no reason to discuss the contention of the applicant on the issue and the relied upon decisions submitted by them".

16. We observe that the observation made by the Ld. Commissioner as reproduced above has been accepted by the department, as no appeal has been filed against this observation. Thus, we hold that the issue of time bar is not a part of this appeal as the issue has already been

decided by the Ld. Commissioner and no appeal has been filed by the department against the said decision.

17. Regarding the issue of applicability of unjust enrichment, the Appellant stated that they have paid the tax under the category of 'Consulting Engineer service' under a mistaken belief. As service tax is not payable in this case, the question of unjust enrichment does not apply to this case. In this regard, they relied upon the decision in the case of of *Commr. of C. E. (Appeals), Bangalore Vs. KVR Construction-2012 (26) STR 195 (Kar.) and* Bansal Biscuits Pvt Ltd. We observe that the decisions cited by the Appellant are squarely applicable in this case. Thus, by following the decisions cited above, we hold that the issue of unjust enrichment is not applicable in this case.

17. In view of the above discussion, we hold that the Appellant is eligible for the refund of service tax paid, along with interest. Accordingly, we set aside the impugned order and allow the appeal filed by the Appellant, with consequential relief, if any, as per law.

(Dictated and pronounced in the open Court)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar