IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH: KOLKATA
REGIONAL BENCH – COURT NO. 2

Service Tax Appeal No. 76137 of 2014

(Arising out of Order-in-Appeal No. 697/Pat/S.Tax/Appeal/2014 dated 15.05.2014 passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, 2nd Floor, Central Revenue Building, Birchand Patel path, Patna – 800 001)

M/s. National Buildings Construction Corporation Ltd. : Appellant
401, Mangal Tower, 4th Floor, Old H.B. Road,
Near Kanta Toli Chowk, P.S.: Lower Bazar, Ranchi – 834 001

VERSUS

Commissioner of Central Excise and Service Tax : Respondent
Ranchi Commissionerate

APPEARANCE:

Shri Tarun Chatterjee, Advocate
Assisted by Shri Raju Mondal, Advocate
for the Appellant

Shri Debapriya Sue, Authorized Representative
for the Respondent

CORAM:

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

FINAL ORDER NO. 77805 / 2024

DATE OF HEARING / DECISION: 10.12.2024

ORDER: [PER SHRI R. MURALIDHAR]

The facts of the case are that the appellant is a public sector unit providing services of development of townships for other PSUs. Initially, they were treating the service as 'construction of residential complex service' and paying Service Tax during the period from 01.10.2007 to 30.06.2011. After this, when they came to know that they were not liable to pay Service Tax on such services, they sent a letter to the jurisdictional Assistant Commissioner on 17.08.2011 (duly acknowledged by that office) stating that they are not required to pay Service Tax on such activity and that henceforth they would not be paying any Service Tax.

1.1. After stoppage of Service Tax payment with effect from 18.08.2011, no demand was raised by the Revenue.

2. The appellant filed a refund claim on 16.09.2011 for the period from 01.10.2007 to 30.06.2011. After not receiving any communication about the refund claim so filed, they filed a RTI application to know the status of their refund claim. The said application was filed on 30.03.2013. On 01.07.2013, they received a communication from the RTI authority stating that on 17.02.2012 itself an order was passed indicating the rejection of their refund claim. However, this letter dated 01.07.2013 did not enclose the copy of the said Order dated 17.02.2012.

2.1. Subsequently, they filed one more refund claim on 22.08.2013 mentioning about the earlier refund claim by them.

3. The adjudicating authority vide the Order-in-Original No. 02/Refund/Gaya/2013 dated 06.09.2013 rejected their refund claim holding that their earlier refund claim was already rejected by the then adjudicating authority on 17.02.2012 on the ground that the refund claim was filed belatedly after more than one year whereas as per Section 11B of the Central Excise Act, 1944, the refund claim should have been filed within one year.

3.1. Being aggrieved, the appellant preferred an appeal before the Ld. Commissioner (Appeals) who, vide the impugned order, has dismissed the appeal on a totally different ground viz. that the appellant were not registered under the category of 'residential complex service', which was not even part of the allegations in the Show Cause Notice or the Order-in-Original passed by the adjudicating authority.

4. Being aggrieved, the appellant is before the Tribunal.

5. The Ld. Counsel appearing on behalf of the appellant submits that the appellant were paying the Service Tax in the normal course and only after receiving the clarification from the Department of Revenue, TRU on 14th May, 2010, which was received by them much later, they had come to know that no Service Tax was payable when the activity is that of construction of residential complexes which are to be used by employees of the Government of India. He submits that, therefore, the Service Tax paid by the appellant is not in the nature of tax at all; this amount has been paid by mistake and hence, the provisions of Section 11B of the Act would not be applicable.

5.1. He relies on the case-law of *M/s. OIL India Ltd. v. Commissioner of Central Excise and Service Tax, Dibrugarh [2023 (385) E.L.T. 422 (Tri. – Kolkata)]* wherein it has been held that in cases where Service Tax is not payable but has been paid by mistake, the provisions of Section 11B are not attracted. He also places reliance on the case-law of *Venkatraman Guhaprasad v. Commissioner of G.S.T. & C.Ex., Chennai [2020 (42) G.S.T.L. 124 (Tri. – Chennai)]* wherein the Tribunal at Chennai held that when Service Tax is paid mistakenly, the limitation provisions under Section 11B would not be applicable. He also relies on the case-law of *Commissioner v. KVR Construction [2018 (14) G.S.T.L. J70 (S.C.)]* wherein the Hon’ble Apex Court has upheld the order passed by the Hon’ble Karnataka High Court hold that when tax is paid by mistake, the provisions of Section 11B would not apply.

5.2. In view of these submissions, the Ld. Counsel for the appellant prays that the present appeal may be allowed.

6. The Ld. Authorized Representative of the Revenue reiterates the findings of the lower authorities and justifies the rejection of the refund claim filed by the appellant.

7. On going through the factual matrix, we find that though the Department claims that the appellant's refund claim was rejected by an order which was passed on 17.02.2012, which was also sent by way of Speed Post, no proper documentary evidence has been placed on record to show that this order was actually delivered to the appellant. On the other hand, the appellant has made out a strong case by showing details of the RTI application filed by them on 30.03.2013, for which they had received a reply on 01.07.2013, wherein it is mentioned that their refund claim was rejected by way of an order dated 17.02.2012. We observe that even under this RTI reply, copy of the said order dated 17.02.2012 was not enclosed.

7.1. However, as a matter of abundant precaution, the appellant filed their refund claim once again on 22.08.2013 which was taken up for processing by the adjudicating authority, who has rejected it on the ground that the refund claim was filed beyond the time-period specified under Section 11B of the Act. The Ld. Commissioner (Appeals), in the impugned order, has gone on a different tangent altogether and dismissed the appeal filed by the appellant before him on a totally new ground, which cannot be legally sustained.

7.2. We find that the issue is well-covered by various case-law. This Tribunal in the case of *M/s. OIL India Ltd. v. Commissioner of Central Excise and Service Tax, Dibrugarh [2023 (385) E.L.T. 422 (Tri. – Kolkata)]* has held as under :–

> *"29. Finally, in the case of Credible Engineering Construction Projects Ltd. v. Commissioner of Central Tax, Hyderabad GST - Service Tax Appeal No. 30781 of 2018 - Order dated 25-9-2020, there was a dissent between the members and the matter was referred to a Third Member. Relevant portions of the order are extracted below :-*
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>> *"(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) S.T.R. 117.*
>>
>> *OR*
>>
>> *Limitation prescribed under section 11B is applicable as held by Member (Technical) in view of the ruling of Hon'ble Supreme Court in Mafatlal Industries v. Union of India - 1997 (89) E.L.T. 247.*
>>
>> *Registry is directed to put up the appeal record before Hon'ble President for nomination of 3rd member to consider the aforesaid questions and difference of opinion for his opinion."*
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> *30. In reference, the Third Member vide Order dated 8-2-2022 passed a detailed judgment answering the reference and held that amounts paid under mistaken notions would not be hit by the statutory limitation period. This was noted by the referral Bench and ultimately the appeal was decided in favour of the assessee. Relevant portions of the said order have been extracted below :-*
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> *The Third Member has expressed his opinion as follows :*

> *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"*
>
> *In terms of the opinion expressed by the Learned Third Member, this appeal stands allowed in favour of the appellant assessee. The appellant assessee shall be allowed grant of refund along with interest, as per rules. Appeal allowed. Impugned order is set aside.*

31. In view of the aforesaid analysis, it is concluded that the statutory limitation period prescribed under Section 11B is not applicable to the refund claimed by the Appellant since the amount paid by the Appellant is not a tax."

7.3. The Tribunal, Chennai in the case of *Venkatraman Guhaprasad v. Commissioner of G.S.T. & C.Ex., Chennai [2020 (42) G.S.T.L. 124 (Tri. – Chennai)]* has held as under: -

"5.3 The second ground for rejection of refund claim is on the ground of limitation. Section 11B prescribes a period of one year for filing the refund claim. However, the Hon'ble jurisdictional High Court in the case of 3E Infotech (supra) had occasion to analyse the issue of levy when service tax is paid under mistake of law. The Ld. Counsel has also placed on record the decision of the Hon'ble Apex Court in the case of Commissioner of Central Excise, Bangalore v. KVR Constructions - 2018 (14) G.S.T.L. J70 (S.C.). The said decision arises out of an appeal filed by the department against the judgment of the Hon'ble High Court of Karnataka [2012 (26) S.T.R. 195 (Kar.)], wherein it was held that the provisions of limitation under Section 11B of Central Excise Act, 1944 would not apply for refund of service tax paid by mistake.

5.4 In Shravan Banarasilal Jejani - 2014 (35) S.T.R. 587 (Tri. - Mum.), the Tribunal had occasion to analyse a similar issue and held that erroneous payment of service tax has to be refunded to the *applicant. The Hon'ble High Court of Bombay in Parijat Construction v. Commissioner of Central Excise - 2018 (359) E.L.T. 113 (Bom.) had also taken a similar view.*

6. After appreciating the facts and also following the decisions cited above, I am of the view that the rejection of refund claim is unjustified. The impugned orders are set aside and the appeals are allowed with consequential benefits if any."

7.4. Further, in the case of *Commissioner v. KVR Construction [2018 (14) G.S.T.L. J70 (S.C.)]*, the Hon'ble Supreme Court has dismissed the Special Leave Petition filed by the Revenue against the decision of the Hon'ble Karnataka High Court.

8. In view of the above, we observe that the issue stands squarely covered by the above decisions. Accordingly, we hold that the appellant has filed the refund claim correctly without having to fulfil the time-limit condition specified under Section 11B ibid.

9. We remand the matter to the adjudicating authority to take up the refund claim filed by the appellant for processing and to pass a considered decision within a period of three months from the date of receipt of this Order.

10. The appeal stands disposed of thus.

(Dictated and pronounced in the open court)

Sd/-
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd