IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: ST/86924/2017

[Arising out of Order-in-Appeal No: PUN-EXCUS-001-APP-51-17-18 dated 03/05/2017 passed by the Commissioner of Central Excise (Appeals), Pune – I.]

Commissioner of Central Excise
Pune – II …***Appellant***

versus

Limson Engineering Pvt Ltd ***…Respondent***

Appearance:

Shri Dilip Shinde, Assistant Commissioner (AR) for appellant

Shri Makrand Joshi, Advocate for respondent

CORAM:

Hon'ble Shri M V Ravindran, Member (Judicial)

Date of hearing: 12/03/2018
Date of decision: 12/03/2018

ORDER NO: A/85659 / 2018

This appeal is filed by Revenue against Order-in-Appeal No: PUN-EXCUS-001-APP-51-17-18 dated 03/05/2017 passed by the Commissioner of Central Excise (Appeals), Pune – I.

2. Heard both the sides and perused the records.

3. The relevant facts that rise for consideration in this case is whether the respondent herein is eligible for the refund of the amount paid as service tax though not payable. Respondent herein received an order for fabrication of goods from his customers; after carrying out fabrication activity supplied the finished goods to their customers, raised invoices for labour charges; discharged service tax liability on the invoices raised for labour charges and filed returns with the authorities. Revenue authorities initiated action against the respondent alleging that fabrication activity undertaken by him is amounting to manufacture and hence liable for Central Excise duty. Show cause notice dated 20/01/2013 was issued for demand of Central Excise duty, which was settled by the appellant before the Settlement Commission. Subsequently, they filed an application for refund on 18/04/2016 for the refund of service tax paid by them on the ground that they have paid the tax erroneously by mistake. The said refund claim was rejected by the adjudicating authority after following due process of law on the reasoning that the refund claim is barred by limitation and the doctrine of unjust enrichment is attracted. On appeal, the first appellate authority set aside the order-in-original and allowed the appeal.

4. Learned Authorised Representative after taking through the

facts of the case, reads order-in-original and order-in-appeal and grounds of appeal. He submits that the provisions of Section 11B are very clear inasmuch as the amount which has been sought as refund as claimed, has to be filed within one year of the relevant date. It is his submission in the case in hand that the respondent discharged service tax liability on his own volition and tax was due. The refund application filed on 18/04/2016 for the tax discharged during October 2010 to June 2011 is hit by limitation; that the doctrine of unjust enrichment also applies in this case inasmuch as that while preparing invoices for the labour charges, respondent had indicated the service tax amount and collected the same from their customers.

5. He relied upon the decision of the apex Court in the case of *Collector of Central Excise v. Kashyap Engineering & Metallurgicals Pvt. Ltd.* [2002 (142) ELT 518 (SC)]; *Sarita Handa Exports (P) Ltd. v. Union of India* [2015 (321) ELT A206 (SC)] and the judgment of the Hon'ble High Courts *MCI Leasing Pvt Ltd v. Commissioner of Central Excise, Mysore* [2014 (33) STR 497 (Kar)] and *Andrew Telecom (I) Pvt. Ltd. v. Commissioner of Central Excise,, Goa* [2014 (34) STR 562 (Bom.).

6. Learned Counsel appearing for the respondent submits that the revenue authorities in this case have themselves accepted the fact that the respondent is not required to discharge service tax liability during

the period in question and is required to discharge Central Excise duty which they have done so. It is submission that the amount collected as service tax by the Revenue authorities is without the authority of law and the limitation as prescribed under the provisions of Section 11B of the Central Excise Act, 1944 will not be applicable to such a situation. For this proposition he relies upon the decision of the Hon'ble High Court of Bombay in the case of *Parijat Constructions v. Commissioner of Central Excise, Nashik* [2017-TIOL-2170-HC-MUM-ST]; *In House Productions Limited v. Commissioner of Service Tax, Mumbai* [2017-TIOL-1242-HC-MUM-CX] and unreported judgment in the case of *Commissioner of Central Excise, Nagpur v. SGR Infratech Limited* in Central Excise Appeal No. 26 of 2014 decided on 28/10/2015.

7. On careful consideration of the submission I find that the following issues needs to be decided in the present appeal:

(i) Whether the refund claim filed by the respondent is time-barred as per the provisions of Section 11B of Central Excise Act, 19044 as made applicable to the Finance Act, 1994; and

(ii) Whether the claim is hit by principles of unjust enrichment.

8. It is undisputed that for the period October 2010 to June 2011 respondent had discharged service tax liability on an assumption that they are liable to pay service tax on the labour charges. Subsequently, when the department pointed out that the fabrication work undertaken by them is amounting manufacture and they require to discharge Central Excise duty, they did so by settling the matter before the Settlement Commission which in turn should mean that the service tax discharged by the respondent herein was not payable by them. In turn, it has to be held that the amount paid as service tax by the respondent was held back by Revenue authorities without any authority of law. I find that the first appellate authority in the impugned order has correctly appreciated the factual aspect and the law on the point of refund claim being wrongly rejected on limitation. The findings of the first appellate authority are undisputed inasmuch that the respondent had made payment of service tax under an assumption that the respondent was liable to do so when there was no liability. I find that the judgment of the Hon'ble High Court of Bombay in the case of *Parijat Constructions (supra)* an d *In House Productions Ltd (supra)* and *SGR Infratech Ltd (supra)* are directly on the point and covers the issue in favour of the respondent.

9. As regards the question of unjust enrichment it is recorded by the first appellate authority in the impugned order in paragraph No. 13, that the respondent had produced a Chartered Accountant's

certificate indicating clearly that the amount of refund claim filed by them are reflected in the balance sheet as amounts receivable from the Central Excise department and they have not passed on the amount to their customers. Revenue authorities in the appeal memorandum did not effectively counter these findings of fact by the first appellate authority. In the absence of any contrary evidence to indicate that respondent has recovered the amount from their customers, I find that the first appellate authority has come to a correct conclusion in holding that there is no unjust enrichment in this case.

10. In view of the foregoing I find that the impugned order is correct, legal and does not suffer from any infirmity and the appeal stands rejected.

(Pronounced in Court)

(M V Ravindran)
Member (Judicial)

**/as*