CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

REGIONAL BENCH - COURT NO. 02

Service Tax Appeal No. 86273 of 2015

(Arising out of Order-in-Appeal No. PUN-EXCUS-001-APP-230 & 231-14-15 dated 17.03.2015 passed by Commissioner of Central Excise (Appeals), Pune-I)

M/s. Aamby Valley City Developers Ltd. .....**Appellant**
Aamby Valley, Village Ambavne,
Tal. Mulshi, Lonavala, Pune - 410401

VERSUS

Commissioner of Central Excise, Pune-I .....**Respondent**
ICE House, 41-A Sasson Road,
Opp. Wadia College, Pune-411001

Appearance:

Shri S.S. Gupta, C.A. for the Appellant
Shri M.K. Sarangi, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87688/2019

Date of Hearing: 12.04.2019
Date of Decision: 12.04.2019

Per: S.K. MOHANTY

Briefly stated, the facts of the case are that the appellant herein is engaged in running of hotels at Aamby Valley City and also undertakes various construction work for the land owners, who place orders for such facilities. During the disputed period October 2002 to December 2004, the appellant had procured various input services from outside India for providing such services to its Indian clients. The appellant had paid service tax amounting to Rs.1,20,37,462/- on importation of the services, under Reverse Charge Mechanism. Subsequent to payment of service tax, the appellant realized that service tax was not required to be paid on import of services prior to the period 18.04.2006. Accordingly, the appellant had filed the refund application, claiming refund of service tax paid by it as a recipient of taxable service from outside the country. The refund application filed by the appellant was rejected by the authorities below and finally, this Tribunal vide order dated 12.07.2013 had allowed the appeal, holding that the appellant was not liable to pay service tax under Reverse Charge Mechanism for the period up to 18.04.2006 and accordingly, remanded the matter to the original authority for verification of the unjust enrichment aspect in respect of the refund claim lodged by the appellant. Pursuant to the remand direction of the Tribunal, the original authority took up *de novo* adjudication proceedings and passed the order dated 21.01.2014. Vide the said order, the above refund claimed amount was sanctioned, but appropriated under Section 87(b) of the Finance Act, 1994 in respect of the past liability towards payment of service tax defaulted by some of the service providers. Against the said adjudication order dated 21.01.2014, both the appellant as well as Revenue had preferred appeals before the learned Commissioner (Appeals). The appeals were disposed of by the learned Commissioner (Appeals) vide the impugned order dated 17.03.2015, in modifying the adjudication order. The impugned order has held that the amount of refund claim of Rs.1,20,37,462/- sanctioned by the original authority is hit by the doctrine of unjust enrichment and therefore, the said amount cannot be sanctioned in favour of the appellant. It has further been held that since the refund amount has been ordered for crediting into the Consumer Welfare Fund, the appellant would not be considered as the beneficiary of such refund amount and thus, the same cannot be appropriated under the provisions of Section 87 (b) *ibid.* Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal, *inter alia*, on the ground that the doctrine of unjust enrichment has been duly complied with inasmuch as the appellant had not charged the tax element in the profit and loss account as an expenditure and that no amount was payable by the appellant to various service providers and hence, the provisions of Section 87 *ibid* cannot be invoked against the appellant.

2.1 The learned Consultant appearing for the appellant submitted that the expenses incurred by the appellant in the construction activities undertaken by it along with service tax amount was debited to the work-in-process account, until the construction was completed and the same was not debited to the profit and loss account. Thus, he submitted that since the disputed service tax amount was lying as work-in-process and not charged to the profit and loss account, the appellant had borne such tax burden and as such, the doctrine of unjust enrichment would not be applicable to the case in hand and the appellant should be entitled for the refund benefit. In this context, he has relied upon the decisions of this Tribunal, rendered in the case of Hero Honda Motors Ltd. - 2000 (126) E.L.T. 1014 (Tribunal), Pride Foramer - 2006 (200) E.L.T. 259 (Tri. – Mumbai), Maruti Udyog Ltd. - 2003 (155) E.L.T. 523 (Tri.-Del.) and Manoj Kumar Agrawal - 2006 (194) E.L.T. 45 (Tri.-Del.).

2.2 The learned Consultant further submitted that the service tax was payable by the appellant in terms of Section 68 (2) *ibid* under Reverse Charge Mechanism and therefore, there was no scope or occasion for recovering the same from the supplier at a later date. He also submitted that the doctrine of unjust enrichment does not apply to the case of payment of service tax under Reverse Charge mechanism, prior to the period 18.04.2006. In this context, he has relied upon the decision of this Tribunal in the case of Biochem Pharmaceuticals – 2006 (195) E.L.T. 150 (Tri.-Mum.).

2.3 The learned Consultant further submitted that no amount was payable to the service provider, except an amount of Rs.47,258/- payable to M/s B.M. Nath, which had already been paid by the appellant. Thus, he submitted that the provisions of Section 87 *ibid* cannot be applied to the present case. The learned Consultant also submitted that the doctrine of unjust enrichment does not apply to the interest amount paid by the appellant. He has relied upon the judgment of Hon'ble Bombay High Court in the case of M/s United Spirits – 2009 (240) E.L.T. 513 (Bom.), to substantiate such stand.

3. On the other hand, the learned AR appearing for the Revenue reiterated the findings recorded in the impugned order.

4. Heard both sides and perused the records.

5. We find that the original authorities vide the adjudication order dated 21.01.2004 had allowed the refund claim in favour of the appellant, holding as under:-

> "*9. On the other hand, the Claimant has time and again claimed that they were not liable to pay service tax on the service received from non resident, which view has been accepted by the Hon'ble CESTAT, Mumbai bench and confirmed in Para 6 of its order dated 12.07.2013 stating that the service tax confirmed against the Claimant is not sustainable in law and are eligible for refund of service tax paid in pursuance of the demand. Moreover, the claimant has now produced documentary evidence to prove reversal of Cenvat Credit availed by them by submitting Cenvat Credit Reversal Voucher copy and Summary of Cenvat Register from Oct, 2002 to March, 2009 from which it is evident that the service tax liability has not been passed on and hence the Claimant appears eligible for refund of Rs.1,20,37,462/-. Therefore the claim appears to be sanctionable to the claimant as consequential refund as per CESTAT's order No. A/1553-1554/13/CSTB/C-1 dt. 12.07.2013.*"

6. However, on perusal of the impugned order, we find that the learned Commissioner (Appeals) has modified the adjudication order, without proper examination of the issue, whether the refund amount in question had actually been charged to the profit and loss account or not.

Further, the amounts payable to various service providers, in order to attract the provisions of Section 87 *ibid* have also not been addressed properly with the help of the documentary evidences. Furthermore, it is also observed by us that the submissions made by the appellant were not addressed in effective manner for adjudication of the dispute. Therefore, we are of the considered view that the issues involved in this case are required to be reconsidered by the learned Commissioner (Appeals) for arriving at a proper conclusion, whether or not the appellant should be entitled for refund benefit.

7. In view of above discussions, the impugned order is set aside and the matter is remanded to the learned Commissioner (Appeals) for deciding the issues afresh. For the said purpose, the learned Commissioner (Appeals) should examine the submissions of appellant recorded in proceeding paragraphs and to be made by the appellant before him. Needless to say, that opportunity of personal hearing should be granted to the appellant before deciding the issues afresh.

8. In the result, the appeal is allowed by way of remand.

(Operative part of the order pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Judicial)

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