

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
MUMBAI**

Service Tax Appeal No. 87026 of 2018

(Arising out of Order-in-Appeal No. Cd/TR(Appeals)/ME/59/2017 dated 07.02.2018 passed by the Commissioner of Central Excise, Mumbai-III, (Appeals))

HALLIBURTON OFFSHORE SERVICES INC.

.... Appellant

16th & 17th Floor, Commerz II International Business
Park, Oberoi Garden City of Western Express Highway,
Goregaon East, Mumbai-400063

Versus

**Commissioner of Central Goods &
Service Tax, Mumbai (East)**

... Respondent

9th Floor, Lotus, Parel, Lotus Infocenter Near Parel Station,
Parel (East), Mumbai-12

Appearance:

Shri Shailesh Seth, Advocate for the Appellant

Shri Dilip Shinde, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86279/2022

Date of Hearing: 06.04.2022

Date of Decision: 30.09.2022

Per: S. K. Mohanty

Briefly stated, the facts of the case are that the appellant herein is engaged *inter alia*, in providing various Oilfield Services to Oil Exploration and Production Companies across India, including in Exclusive Economic Zones (EEZ). For providing the said services, the appellant got itself registered with the service tax department under the taxable category of "Mining Service", defined under Section 65 & 65B of the Finance Act, 1994. During the period July 2009 to February 2011, the appellant had provided such taxable service to M/s. ONGC (governed under the EEZ scheme). The appellant had

discharged the service tax liability for providing the taxable service. Prior to the period 01.07.2012, service tax was not payable on the services provided to the EEZ. Thus, the recipient of service M/s. ONGC had recovered service tax amount of Rs.17,28,166/- from the appellant in the month of February 2013. Subsequently, the appellant had taken *sou motu* credit of such service tax amount in the cenvat accounts maintained for the period May 2013 under Rule 6(4A) of the Service Tax Rules, 1994. Taking of *sou motu* credit was objected to by the CERA Audit on the ground that no provisions exist in the Service Tax statute for taking such action by the assessee. On the basis of audit objections, the department initiated show cause proceedings against the appellant, which culminated into the adjudication order dated 14.12.2016, wherein the Learned Additional Commissioner of Service Tax had confirmed service tax demand of Rs. 17,28,166/- along with interest and also imposed penalties under Section 77 & 78 of the Finance Act, 1994. On appeal against the said adjudication order, the Learned Commissioner (Appeals), CGST & Central Excise, Thane vide the impugned order dated 28.02.2018 has upheld the said order and rejected the appeal filed by the appellant. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

2. Learned Advocate appearing for the appellant submitted that prior to the period 01.07.2012, service tax was not payable on the services provided by the appellant in EEZ and that since the service tax liability was duly discharged by the appellant, adjustment of the cenvat account, consequent upon recovery of such amount by the service provider is in conformity with Rule 6(4A) *ibid*. To support such stand, the Learned Advocate has relied upon various judgments delivered by the judicial forums.

3. On the other hand, Learned AR appearing for Revenue reiterated the findings recorded in the impugned order and also relied upon the judgment of

Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. Vs. Union of India, reported in 1997 (89) E.L.T. 247 (S.C.) and the decision of the Larger Bench of this Tribunal in the case of BDH Industries Ltd. Vs. CCE -2008 (229) E.L.T 364 (Tri.-L.B.) to state and submit that availment of *suo motu* cenvat credit is not permissible under the statute and only way provided therein is for filing the refund application under Section 11B of the Central Excise Act, 1994 (made applicable to the service tax matters under Section 83 of the Finance Act, 1994).

4. Heard both sides and examined the case records.

5. The issue involved in this appeal for consideration by the Tribunal is, whether erroneous payment of service tax can be adjusted *suo motu* by the appellant, without taking recourse to the refund provisions contained in the statute.

6. The appellant has contended that Exclusive Economic Zone (EEZ) was not included in the purview of the definition of 'India' in the service tax statute prior to 2012 and accordingly, services provided in such area were not liable for payment of service tax. They further contended that since the service tax was erroneously paid by them in the year 2011, they were permitted under the statute for adjustment of such excess service tax paid into the Central Government account. The appellant has relied upon Rule 6 (4A) of the Service Tax Rules, 1994 to state that *suo motu* adjustment of excess service tax in the books of accounts is permissible under the law. The relevant statutory provisions are extracted herein below:

"Rule 6 (4A) - Notwithstanding anything contained in sub-rule (4), where an assessee has paid to the credit of Central Government any amount in excess of the amount required to be paid towards service tax liability for a month or quarter, as the case may be, the assessee may adjust such excess amount paid by him against his service tax

liability for the succeeding month or quarter, as the case may be”.

7. On perusal of the above statutory provision, it reveals that excess amount paid by the assessee is permissible for adjustment of the tax liability for the succeeding month or quarter. In the present case, the appellant had paid the service tax in respect of the services provided to the EEZ unit in the year 2011. As per the statutory mandates, the appellant was eligible to adjust such excess payment of tax in the immediately succeeding month or quarter as the case may be. Admittedly, the appellant had resorted to *suo motu* adjustment of Rs.17,28,166/- after a period of more than one year. Since, the statutory requirements of making adjustment of the disputed tax amount was not complied with by the appellant, the action on the part of the department is proper and justified in confirming the adjudged demands. I find that the case of the appellant is squarely covered by the decision of the larger bench of this Tribunal in the case of BDH Industries Ltd. (Supra), wherein it has been held that *suo motu* taking of credit or refund without proper sanction of law is not correct and justified. The relevant paragraph in the said order is reproduced hereunder:

"12. *We find that there is no provision under Central Excise Act and Rules allowing suo moto taking of credit or refund without sanction by the proper officer. The appellant's contention that refund in respect of duty paid twice cannot be considered as refund of duty and is only the accounting error does not appeal to us as the debit entry made in the accounts is towards payment of duty only and therefore refund of these amounts has to be considered as refund of duty only. The PLA account and the credit accounts are required to be submitted to the department and any correction carried therein, need to have department's sanction. We also note that the law relating to refund has been fully analysed by the Apex Court in the case of Mafatlal Industries (cited supra) which makes it very clear that all types of refund claim be there of excess duty paid or otherwise are to be filed under Section 11B and have to pass the proof of not passing on the incidence of duty to others. The recent decisions of Hon'ble Supreme Court in the case of*

Sahakari Khand Udyog and Others clearly laid down that all refunds have to pass through doctrine of unjust enrichment, even if it is not so expressly provided for in the statute. From these decisions it clearly emerges that all types of refund have to be filed under Section 11B of the Central Excise Act and no suo moto refund can be taken unless and until the department is satisfied that the incidence of duty has not been passed on”.

8. The only active provision for sanction of refund claim of excess duty is contained in Section 11B of the Central Excise Act, 1944. The facts are not under dispute that the appellant had not complied with the said requirements provided under the statute. Since, the appellant did not comply with the requirements of Service Tax Rules, 1944 and did not file any claim application under Section 11B *ibid*, the *suo motu* adjustment of service tax has no legal sanctity and such adjusted amount of tax can be recovered in the manner provided in the statute. The Constitutional Bench of the Hon’ble Supreme Court in the case of Mafatlal Industries Ltd. (*supra*) have ruled that the enactment under Section 11B *ibid* constitute “law” within the meaning of Article 265 of the Constitution of India and hence, all refund claims have to be filed and adjudicated under the provisions of the statute. The ratio of the judgements relied upon by the learned Advocate for the appellant are not applicable to the circumstances of the present case, in view of the judgment of Hon’ble Supreme Court in the case of Mafatlal Industries Ltd. (*supra*).

9. In view of the foregoing discussions and analysis, I do not find any infirmity in the impugned order passed by the Learned Commissioner (Appeals). Accordingly, the present appeal filed by the appellant is dismissed.

(Pronounced in open court on 30.09.2022)

(S.K. Mohanty)
Member (Judicial)