CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. 4

Service Tax Appeal No. 86305 of 2020

(Arising out of Order-in-Appeal No. AJV/123/RGD APP/2020-21 dated 17.09.2020 passed by the Commissioner of Central Tax (Appeals), Raigad)

Amit B. Wadhwani **Appellant**
9/10, Neelkanth Commercial Complex,
Chembur Station Road,
Mumbai 400 071.

Vs.

Commissioner of Central Tax, Navi Mumbai Respondent
10th Floor, Satra Plaza, Palm Beach Road,
Sector 19D, Vashi, Navi Mumbai 400 705.

Appearance:

Shri H.G. Dharmadhikari, Advocate, for the Appellant
Shri A.K. Srivastava, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)

Date of Hearing: 18.12.2023
Date of Decision: 22.12.2023

FINAL ORDER NO. 87271/2023

PER: P.K. CHOUDHARY

The issue involved in the present appeal pertains to refund of the amount paid during investigation but not appropriated by the department after conclusion of such investigation and accordingly whether the refund is barred by limitation under the provisions of Section 11B of the Central Excise Act, 1944.

2. The facts of the case in brief are that the Appellant had issued Tax Invoice No. ABW/01/17-18 dated 3rd April 2017 to M/s. Kings Empire Heights Pvt. Ltd. and paid Service Tax thereon vide Challan No. 50064 dated 26.03.2018 for Rs.37,57,707/-. The said Invoice was cancelled subsequently since the services were not provided. The Appellant states that the Income tax Returns were also filed for the relevant period. In the meantime, the Anti Evasion wing of the Service Tax

Department conducted investigations into the Service Tax matters of the Appellant covering the relevant Period for which the said Invoice pertained. The Investigations concluded in the month of July 2019 and the investigating authorities were apparently satisfied with the issuance of the said invoice and its subsequent cancellation as no remarks contrary to the same were recorded. The Appellant states that after the conclusion of investigation in July 2019, the refund claim was filed on 29.11.2019 for refund of the amount paid against the said invoice since no service had been provided, and consequently, no consideration had been received from the recipient-client.

3. The period involved was post 2012 and the definition of "service" during the relevant point in time as per Section 65 B of the Finance Act, 1994 contemplated any activity carried out by a person for another person for consideration. In this case there is no consideration, and therefore, there is no service. In the present case, as the amount was deposited in anticipation of a service, which was never provided, the amount so deposited did not partake the characteristics of Service tax.

4. The department issued Show Cause Notice F.No. V/CGST/NM/Dn-I/R- I/Refund/amit/74/19-20 dated 11.12.2019 proposing rejection of the refund claim on the ground of limitation as prescribed under Section 11 B of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. The Show cause notice also proposed that the Refund Claim was not filed in the prescribed Form-R as required under the provisions of Section 11 B of Central Excise Act 1944 read with Section 83 of the Finance Act 1994 under the wrong impression that the Appellant was claiming the Refund of Service tax whereas the Appellant had claimed refund of the amount paid mistakenly.

5. The Appellant replied to the said notice vide submissions dated 24.12.2019 wherein they have stated that as regards the "Limitation" aspect, the first opportunity to file the refund claim had arisen only after July 2019 as the matter continued to be under investigation and only when the Anti-evasion team closed

the investigation the refund claim could be filed. The Appellant mentioned in the submissions that non-filing of claim in the prescribed form is a curable defect and the Appellant filed the prescribed form together with the said written submissions and submitted that the subject refund claim could not be rejected on this ground since it is a mere deposit and not a tax.

6. Thereafter, the adjudicating authority rejected the refund claim vide Order-in- Original No. F.No. V/CGST/NM/Dn-I/Refund/Amit/74/19-20 dated-22.01.2020 on the ground that the refund claim was not filed within time as specified in Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act 1994. The Appellant preferred an appeal before the Commissioner of GST and CX (Appeals). The learned Advocate for the Appellant submitted that amount is not a tax and placed reliance on the judgement of the Hon'ble Bombay High Court in the case of Parijat Construction [2018 (359) ELT 113 (Bom.)] and the judgment of the Hon'ble Madras High Court in the case of 3E capital InfoTech [2018 (18) GSTL 410 (Mad.)]. The learned Commissioner (Appeals) rejected the appeal vide Order-In-Appeal No. AJV/123/RGD APP/2020-21 dated 17/09/2020. The appellant also relies on the Chartered Accountant Certificate dated 09.11.2020 which states that the invoice was treated as cancelled subsequently and service tax paid on the same has been claimed as refund. The cancelled invoice was not part of the turnover in the Profit & Loss Account in the concerned financial year. Hence the present appeal by the appellant before this Tribunal.

7. Learned Advocate appearing on behalf of the Appellant submits that the Appellant had not provided the service to M/s Kings Empire Heights Pvt. Ltd. and therefore, had canceled the tax invoice issued by the Appellant. During the course of investigation, this fact was explained. However, to prove its bonafides, the Appellant paid Rs.37,57,707/- vide Challan No 50064 dated 26.03.2018. Investigation got concluded in July 2019 but thereafter the Appellant was neither issued any show cause notice contemplating recovery of service tax along with

interest and penalty for delayed payment nor was issued any order appropriating the amount paid by the Appellant as a service tax liability. Thus, the amount which was paid is not a tax amount in the absence of appropriation. The Appellant therefore filed refund claim which has been rejected on the ground of limitation by applying the provisions of Section 11B of the Central Excise Act, 1944 which inter alia are applicable only to the amount of Service Tax and Excise Duty which is refundable on various grounds. However, any amount which is neither appropriated nor confirmed as a Service Tax is merely a deposit and therefore, the provisions of Section 11B cannot be applied to decide such refund claims for refund of deposited amount for the reason that such deposit cannot be withheld by the revenue without the authority of law. In support of his submissions, reliance was placed on the following judgements:

a) Way2wealth Brokers Pvt. Ltd. vs. Commissioner of C. T., Bengaluru [2022 (61) G.S.T.L. 349 (Kar)]

b) Commr. of C.EX (Appeals), Bangalore v/s KVR Construction [2012 (26) S.T.R. 195 (Kar)]

c) Vyankatesh Real Estate Developers v/s CCE, Nagpur [2014 (35) STR 589 (Tri.-Mumbai)]

d) Bhavnagar v/s Madhavi Procon Pvt. Ltd. 2015 (38) STR 74 (Tri. Ahmd.)

e) Kodak India Ltd vs Commissioner of customs, C.EX, Indore (MP) [2012 (282) E.L.T 478 (Tri.-Del)]

f) Order passed by Principal bench in case of Excise Appeal No. 53677 of 2018. [Sun Pharmaceutical Industries Ltd V/s Commissioner of Central Excise, Customs]

g) Order passed by Principal bench in Service Tax Appeal No. 51524 of 2022-SM [M/s B.L Goel & company V/s CCE & Central Goods & Service Tax]

h) Everon Project Consultant Ltd. v/s CC & ST, Panchkula [2017 (7) GSTL 465 (Tri. Chan.)]

i) Order passed by the Tribunal in Service Tax Appeal No. 85076 of 2011 [M/s Raheja Regency Cooperative Housing Society V/s Commissioner of GST & Central Excise Mumbai vide final order No. A/86159/2022 dated 08.12.2022.]

8. Learned departmental representative justified the impugned order and prayed that the appeal filed by the appellant being devoid of any merits may be dismissed. He relied upon the following case laws in support of his submissions:

i. Cannanore Handloom Exports [2021 (44) GSTL 345 (Ker.)]

ii. S.I. Property Kerala Pvt. Ltd. [2019 (29) GSTL 632 (Ker.)]

iii. Tanna Electric Co. [2020 (35) GSTL 129 (Tri.-Mumbai)]

iv. Quest Global Engineering Services Pvt. Ltd. passed by Hon'ble Madras High Court in W.P. No. 12105 of 2020 vide order dated 21.12.2021.

9. Heard both sides and perused the appeal records.

10. I find that the refund claim filed by the Appellant cannot be rejected on the ground of limitation as what was paid by the appellant was not tax as envisaged under the Finance Act, 1994. Thus, the amount paid by the Appellant would not take the character of tax but is simply an amount paid under a mistake of law. The provisions of Section 11B ibid would, therefore, not be applicable to an application seeking refund thereof. Moreover, since the retention of the amount in issue by the department is without authority of law, the question of applying the limitation prescribed under Section 11B ibid would not arise. Even in case where any amount is paid by way of self assessment, if it has been paid by mistake or through ignorance, it is always open to the assessee to bring it to the notice of the authority concerned

and claim refund of the amount wrongly paid. For a service to be taxable, it is necessary that the service has to be rendered by one person to another and without a perceived service money contribution cannot be held to be a consideration which is liable to tax. The authority concerned is duty bound to refund such amount as retention of such amount would be in violation of Article 265 of the Constitution of India which mandates that no tax shall be levied or collected except by authority of law. Since Service Tax received by the concerned authority is not backed by any authority of law, in view of the provisions of Article 265 of the Constitution of India, the authority concerned has no right to retain the same.

11. Both sides have relied on a plethora of judgments on the issue of the applicability of the limitation provided under Section 11B to amounts paid under mistake of law. The tenor of the jurisprudence on the subject indicates that the limitation prescribed under Section 11B is not applicable to a refund claim in a situation where the concerned tax was never payable by the assessee. In other words, had the Department raised a demand of such an amount, the assessee could have successfully challenged the constitutionality of the same.

12. This principle was laid down by the Hon'ble Karnataka High Court in CCE Bangalore vs. KVR Constructions [2012 (26) S.T.R. 195 (Kar.)], the relevant portions of which have been extracted below:-

"17. If this Court ultimately concludes that Section 11B of the Act is applicable to the facts of the present case, then, the argument of the learned Counsel for the appellant that Writ Petition was not maintainable would merit consideration. Therefore, at this stage, we will not consider the matter regarding maintainability of the Writ Petition, as first we have to look to the provisions of 11B of the Act and then decide whether Section 11B is applicable to the facts of the case as finding thereon would have bearing for considering the issue of maintainability of Writ Petition. Section 11B of the Central Excise Act reads as under :

"11B. Claims for refund of duty :

(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the document referred to in Section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person."

18. From the reading of the above Section, it refers to claim for refund of duty of excise only, it does not refer to any other amounts collected without authority of law. In the case on hand, admittedly, the amount sought for as refund was the amount paid under mistaken notion which even according to the department was not liable to be paid.

19. According to the appellant, the very fact that said amounts are paid as service tax under Finance Act, 1994 and also filing of an application in Form-R of the Central Excise Act would indicate that the applicant was intending to claim refund of the duty with reference to Section 11B, therefore, now it is not open to him to go back and say that it was not refund of duty. No doubt in the present case, Form-R was used by the applicant to claim refund. It is the very case of the petitioner that they were exempted from payment of such service tax by virtue of circular dated 17-9-2004 and this is not denied by the Department and it is not even denying the nature of construction/services rendered by the petitioner was exempted from to payment of Service Tax. What one has to see is whether the amount paid by petitioner under mistaken notion was payable by the petitioner. Though under Finance Act, 1994 such service tax was payable by virtue of notification, they were not liable to pay, as there was exemption to pay such tax because of the nature of the institution for which they have made construction and rendered services. In other words, if the respondent had not paid those

amounts, the authority could not have demanded the petitioner to make such payment. In other words, authority lacked authority to levy and collect such service tax. In case, the department were to demand such payments, petitioner could have challenged it as unconstitutional and without authority of law. If we look at the converse, we find mere payment of amount, would not authorize the department to regularise such payment. When once the department had no authority to demand service tax from the respondent because of its circular dated 17-9- 2004, the payment made by the respondent company would not partake the character of "service tax" liable to be paid by them. Therefore, mere payment made by the respondent will neither validate the nature of payment nor the nature of transaction. In other words, mere payment of amount would not make it a "service tax" payable by them. When once there is lack of authority to demand "service tax" from the respondent company, the department lacks authority to levy and collect such amount. Therefore, it would go beyond their purview to collect such amount. When once there is lack of authority to collect such service tax by the appellant, it would not give them the authority to retain the amount paid by the petitioner, which was initially not payable by them. Therefore, mere nomenclature will not be an embargo on the right of the petitioner to demand refund of payment made by them under mistaken notion…."

The judgment of the Hon'ble Karnataka High Court was affirmed by the Hon'ble Supreme Court in SLP No. CC 10732-10733 of 2011 vide order dated 11.07.2011 reported in [2018 (14) GSTL J70 (SC)].

13. The said principle was followed by this Tribunal in the following decisions: -

i. M/s ASL Builders Private Limited vs. Commissioner of Central GST & CX, Jamshedpur [2020 (1) TMI 431 – CESTAT Kolkata]

"13. The aforesaid propositions reveal that what one has to see is whether the amount paid by the assessee under a mistaken notion was payable or not. In other words, if the assessee had

not paid those amounts, the authority could not have demanded from the assessee to make such payment. In other words, the department lacked authority to levy and collect such tax. In case, the department was to demand such payment, the assessee could have challenged it as unconstitutional and without authority of law. When once there is lack of authority to demand service tax or excise duty from the assessee, the department lacks authority to levy and collect such amount and the said amount is not "Service Tax" or "Excise duty" and Section 11B of the Act has no application in such cases.

…

19. In view of the above discussion and by respectfully following the judgements of the superior Courts, cited supra, the impugned orders cannot be sustained and are set aside. The appeal filed by the appellant is allowed with consequential relief."

ii. M/s Techno Power Enterprises Private Limited [Service Tax Appeal No. 75972 of 2021]

"16. I also find that the Hon'ble Karnataka High Court, while considering the issue at hand, had laid down a test in such cases. The Hon'ble High Court had held that what needs to be ascertained is whether the Revenue could have recovered the amount had the assessee not paid it. In the present case, since the Appellant was not required to pay the amount so paid by them, such amount could not have been recovered by the Revenue and therefore, such amount cannot now be retained by the Revenue.

17. I find that the refund claim filed by the Appellant was filed within the limitation period prescribed under the Article 113 of the Limitation Act, 1963 and since, the amount was not payable by the Appellant under the provisions of the Finance Act, 1994 or the Central Excise Act, 1944, the provisions under the Limitation Act, 1963 would apply."

14. Further, the Hon’ble Bombay High Court, Hon’ble Calcutta High Court, Hon’ble Madras High Court, Hon’ble Telangana High

Court have similarly held that refunds of amounts paid under mistake of law would not be hit by the statutory limitation periods, in the following judgments:-

i. Parijat Construction vs. CCE, Nashik [2018 (9) G.S.T.L. 8 (Bom.)]

"5. We are of the view that the issue as to whether limitation prescribed under Section 11B of the said Act applies to a refund claimed in respect of service tax paid under a mistake of law is no longer res integra. The two decisions of the Division Bench of this Court in Hindustan Cocoa (supra) and Commissioner of Central Excise, Nagpur v. M/s. SGR Infratech Ltd. (supra) are squarely applicable to the facts of the present case.

6. Both decisions have held the limitation prescribed under Section 11B of the said Act to be not applicable to refund claims for service tax paid under a mistake of law. The decision of the Supreme Court in the case of Collector of C.E., Chandigarh v. Doaba Co-Operative Sugar Mills (supra) relied upon by the Appellate Tribunal has in applying Section 11B, limitation made an exception in case of refund claims where the payment of duty was under a mistake of law. We are of the view that the impugned order is erroneous in that it applies the limitation prescribed under Section 11B of the Act to the present case were admittedly appellant had paid a Service Tax on Commercial or Industrial Construction Service even though such service is not leviable to service tax. We are of the view that the decisions relied upon by the Appellate Tribunal do not support the case of the respondent in rejecting the refund claim on the ground that it was barred by limitation. We are, therefore, of the view that the impugned order is unsustainable.

7. We accordingly allow the present appeals and quash and set aside the impugned order, insofar as it is against the appellant in both appeals. We fully allow refund of Rs.8,99,962/- preferred by the appellant. We direct that the respondent shall refund the amount of Rs. 8,99,962/- to the appellant within a period of three months. There shall be no order as to costs."

ii. 3E Infotech vs. CESTAT [2018 (18) GSTL 410 (Mad.)]

"9. In the above cited case, the Supreme Court stated that the Assessee's claim to refund would not be disallowed solely because it seemed barred by limitation. Since the Assessee in that case made the claim for refund shortly after learning about their entitlement for the same, it would not be just to hold that such claim is hit by laches

…

12. Further, the claim of the respondent in refusing to return the amount would go against the mandate of Article 265 of the Constitution of India, which provides that no tax shall be levied or collected except by authority of law.

13. On an analysis of the precedents cited above, we are of the opinion, that when service tax is paid by mistake a claim for refund cannot be barred by limitation, merely because the period of limitation under Section 11B had expired. Such a position would be contrary to the law laid down by the Hon'ble Apex Court, and therefore we have no hesitation in holding that the claim of the Assessee for a sum of Rs. 4,39,683/- cannot be barred by limitation, and ought to be refunded.

14. There is no doubt in our minds, that if the Revenue is allowed to keep the excess service tax paid, it would not be proper, and against the tenets of Article 265 of the Constitution of India. On the facts and circumstances of this case, we deem it appropriate to pass the following directions :- (a) The Application under Section 11B cannot be rejected on the ground that is barred by limitation, provided for under Section."

iii. Vasudha Bomireddy vs. Assistant Commissioner of Service Tax [2020 (35) GSTL 52 (Telangana)]

"18. Having regard to these decisions, we are of the opinion that if the petitioners were not liable to pay 'service tax' on the transaction of the purchase of the constructed area along with goods apart from undivided share of land at all, the payment which was made by the petitioners would not be a payment of

service tax at all; that the department also could not have demanded payment of the same from the petitioners; and merely because the petitioners made the payment, it would not partake the character of 'service tax' and the department cannot retain the amount paid by the petitioners which was in fact not payable by them."

iv. Parimal Ray vs. Commissioner of Customs (Port) [2015 (318) ELT 379 (Cal.)]

"17. Now I will consider the point of limitation. A person to whom money has been paid by mistake by another person, becomes at common law a trustee for that other person with an obligation to repay the sum received. This is the equitable principle on which Section 72 of the Contract Act, 1872 has been enacted. Therefore, the person who is entitled to the money is the beneficiary or cestiqui trust. When the said sum of Rs. 360.46 lakhs was paid by mistake by the petitioner to the Government of India, the latter instantly became a trustee to repay that amount to the petitioner. The obligation was a continuing obligation. When a wrong is continuing there is no limitation for instituting a suit complaining about it. (See Section 22 of the Limitation Act, 1963). The Supreme Court through Mr. Justice Krishna Iyer opined in Shiv Shankar Dal Mills v. State of Haryana reported in AIR 1980 Supreme Court 1037 as follows:-

1. Where public bodies, under colour of public laws, recover people's money, later discovered to be erroneous levies, the Dharma of the situation admits of no equivocation. There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs. Now is it palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of 'alternative remedy' since the root principle of law married to justice, is ubi jus ibiremedium.

2. Another point, in our jurisdiction social justice is a pervasive presence; and so, save in special situations it is fair to be guided by the strategy of equity by asking those who claim the service

of the judicial process to embrace the basic rule of distributive justice, while moulding the relief, by consenting to restore little sums, taken in little transactions, from little persons, to whom they belong."

15. The judgment of Mafatlal Industries vs. UOI [1997 5 SCC 536] = [1997 (89) ELT 247 (SC)] has been considered and interpreted by several judgments including the Karnataka High Court in KVR Construction supra, by this Tribunal in the case of ASL Builders supra, by CESTAT Delhi in Credible Engineering supra. The said judgments have concluded that statutory limitation periods are not applicable to amounts paid under mistake of law.

16. I also find that the Nagpur Bench of the Hon'ble Bombay High Court in the case of CCE, Nagpur vs. SGR Infotech Ltd. (earlier known as Vibrant Infotech Ltd.) Nagpur and anr. In Central Excise Appeal No.26 of 2014 vide judgment dated 28.10.2015 held thus:-

"2. The appellant by placing reliance upon Section 11B of Central Excise Act, 1944 submits that claim for refund ought to have been moved within one year and here, in any case, as assessee has passed on burden to the employer, namely, Nagpur Municipal Corporation, the application for refund is misconceived. Support is being taken from the judgment of the Apex Court in the case of Mafatlal Industries Ltd. and ors. Vs. Union of India and ors. reported at (1997) 5 SCC 536. It is pointed out that the claim by assessee for refund can be viewed as a claim which falls under second category as described in paragraph no. 27 of the said judgment and limitation of one year must apply. Here, the order in original looked into these aspects while rejecting the application for refund and the rejection is maintained by the appellate authority. However, the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in further appeal has overlooked this aspect and hence, the impugned order passed by the CESTAT is liable to be quashed and set aside.

3. Learned counsel Shri Mirza while drawing our attention to the facts of the present matter has taken us through paragraph nos. 9, 23, 27 to 30, 105 and = = 108 of the judgment of the Apex Court in the case of Mafatlal Industries(supra).

4. Learned counsel Shri Dharmadhikari on the other hand submits that fact that service tax was not payable during relevant period is not in dispute. Its recovery is not supported by provisions of Excise Act and hence application for refund was moved in accordance with the period of limitation as looked into by the Hon'ble Apex Court in its judgment mentioned supra i.e. in consonance with clause (c) of Section 17(1) of the Limitation Act. He further adds that here the finding that tax was not recoverable is not in dispute and material to demonstrate that burden has been passed on employer Nagpur Municipal Corporation are not brought on record anywhere. The reliance upon clause 31 of agreement between respondent no. 1 and Nagpur Municipal Corporation to buttress this argument is misconceived. Said clause helps respondent and he therefore submits that no substantial question of law arises in the present matter.

7. The other contention is about the period of limitation. The appellant argues that recovery of tax by them is covered under second type as shown by the judgment of Apex Court in Mafatlal Industries case (supra) particularly paragraph no. 27. The Apex Court found where the tax is collected by the authorities under the Act by misconstruction or wrong interpretation of the provisions of the Act, Rules and Notification or by an erroneous determination of the relevant facts i.e. an erroneous finding of fact, claim for refund arises under the Act. The Hon'ble Apex Court has considered unconstitutional levy in first category. Here, it is admitted that the tax could not have been demanded. We therefore find that situation is not covered by paragraph no. 27. The Hon'ble Apex Court has specifically addressed this issue in above mentioned judgment and its observations are also looked into by the Division Bench of the High Court of Delhi in the case of Hind Agro Industries Limited Vs. Commissioner of

Customs reported at 2008(221) E.L.T. 336(Del.) in paragraph no. 11.

8. We therefore find the contention that the application should be moved within one year is erroneous and in any case, no substantial question of law arises in that respect."

17. Finally, in the case of *Credible Engineering Construction Projects Ltd. vs. Commissioner of Central Tax Hyderabad GST – Service Tax Appeal No. 30781 of 2018 – Order dated 25.09.2020* there was a dissent between the members and the matter was referred to a Third Member. Relevant portions of the order are extracted below: -

"(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 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 Vs Union of India - 1997(89)ELT 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."

18. In reference, the Third Member vide Order dated 8.02.2022 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 assesse. Relevant portions of the said order have been extracted below:-

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."

19. 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.

20. The case laws cited by the learned DR are distinguishable on the ground that in those cases there was appropriation of the tax. In the present case, since the service tax invoice itself is cancelled, so there was no appropriation of the amount as tax.

21. In view of the above discussions, the present appeal is allowed with consequential relief as per law.

(Order pronounced in the open court on 22.12.2023)

(P.K. Choudhary)
Member (Judicial)

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