CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH AT HYDERABAD

Division Bench
Court – I

Service Tax Appeal No. 8 of 2011

(Arising out of Order-in-Appeal No.30/2010 (V-I) ST dt.02.09.2010 passed by Commissioner of Customs, Central Excise & Service Tax, Visakhapatnam)

Global Constructions
Flat No.201, Sarada Towers Facor Layout,
Ramnagar, Visakhapatnam – 530 002 **.....Appellant**

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Visakhapatnam - I
Port Area, Visakhapatnam,
Andhra Pradesh – 530 035 **.....Respondent**

Appearance
None for the Appellant.
Shri A. Rangadham, Authorized Representative for the Revenue.

Coram:
HON'BLE MR. ANIL CHOUDHARY (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30089/2022

Date of Hearing: 06.09.2022
Date of Decision: 15.09.2022

[Order per: P.V. SUBBA RAO]

When this matter was called none appeared on behalf of the appellant and a letter has been received from the learned counsel for the appellant stating that although the matter was posted for hearing today, and the cause list on the website also indicates so, he had not received any separate intimation by email or post and is unable to appear due to short time. Therefore, the matter may be adjourned. We find that the matter was listed on several occasions earlier and was adjourned. On 08.02.2019, none appeared on behalf of the appellant and accordingly, the matter was adjourned. On 19.03.2019, the matter was adjourned on request of the learned counsel for the appellant. On 24.09.2019, the matter was again adjourned on request of the learned counsel for the appellant. On 07.03.2022, none appeared on behalf of the appellant and it was adjourned. We, therefore, proceed to decide the matter based on the records available and after hearing the submissions made by the learned Authorized Representative for the Revenue.

2. The issue, in brief, is that the appellant submitted a letter dated 02.09.2009 to the divisional Assistant Commissioner seeking refund of Rs.1,04,66,929/- on the ground that it had paid service tax on the services rendered by it, but such services do not fall within the purview of the service tax as per the CBEC Circular dated 29.01.2009. It is also indicated in the letter that it had collected the amount so paid as service tax from its customers and requested that the amounts may be refunded directly to various customers, as per the list included with the letter. A show cause notice dated 15.12.2009 was issued proposing to reject the refund claim in terms of section 11B of the Central Excise Act, 1944 as made applicable by section 83 of the Finance Act, 1994 to Service Tax matters. The appellant replied that it is eligible for refund and has followed the procedure required in the refund claim and has submitted the requisite enclosures. Further, it has filed refund claim well within time. Further, the appellant stated that clause of unjust enrichment is not applicable, as the incidence was not passed on to any customer. It further requested that the refund claim may be directly paid to its customers. After following due process, the Assistant Commissioner has by Order dt.28.01.2010 rejected the refund claim filed by the appellant.

3. Aggrieved, the appellant filed an appeal before the Commissioner (Appeals) who, by Order-in-Appeal dt.02.09.2010 (impugned order), found that out of the claim of Rs.1,04,66,929/-, an amount of Rs.10,52,220/- was eligible for refund as the claim was made within the period of limitation of one year, and directed the same to be credited to the consumer welfare fund under section 12C of the Central Excise Act, 1944. He rejected the remaining part of the refund claim. Para 6 of the impugned order is reproduced below:

> *"6. I have carefully gone through the impugned order and considered the rival contentions. Duty payment in the impugned case is not under protest and Service Tax-3 returns were filed periodically showing therein the service tax paid by them. As regards the claim filed, it is in respect of service tax paid for the period 2006-07 to 2008-09 and the service tax refund claimed beyond one year of payment is clearly hit by time bar as per section 11B of the Central Excise Act, 1944. With respect to claim within one year also, relevant date is the date of payment of service tax only and not the due date for filing return. Due date for filing Service Tax-3 return is the relevant date only with respect to the raising of demand of service, as that is the date when the Department comes to know the payment made by the assessee. With respect to claiming of refund, appellant is well aware of his service tax payment and once he feels that service tax is paid by mistake, he can claim refund of the same within*

one year of such payment. Thus, it is rightly decided in the impugned order that only Rs.10,52,220/- was within the period of one year and not the amount of Rs.28,61,499/- as claimed by the appellants based on the due date of filing the return. Further, there is no dispute that the appellants have collected these amounts from the customers and paid to the Department and it is a conclusive proof that the incidence of tax was passed on. By simply giving the names of different customers from whom the service tax was collected, it is not possible to give refund of the eligible amount to the concerned persons, as contended by the appellants in the grounds of appeal. In the facts and circumstances of the impugned case, I do not feel any infirmity in the impugned order. However, as claimed by the appellants in their further submissions, I agree to the aspect of crediting the consumer welfare fund with the amount of eligible refund."

4. Hence, this appeal, on the following grounds:

1. The Commissioner (Appeals) has erred in rejecting the refund claim and they are entitled to the refund claim of the entire amount and the refund claim must be made in favour of the customers who had purchased the apartments. This vital issue was conveniently ignored both at the adjudication stage and also at the first appellate stage.
2. The entire amount was paid by the apartment owners (buyer of flat) who have, in fact taken the liability on their head, and had not passed on the incidence to any other customers. The appellants have collected the amount paid as service tax from the apartment owners or the customers.

5. Learned Authorized Representative for the Revenue submits that the relevant period in this case is October, 06 – March, 07 to October, 08 – March, 09 and the refund claim was filed on 03.09.2009. The total amount of refund claimed was Rs.1,04,66,929/- on the ground that the appellant had paid service tax under the category of "construction of residential complexes" service and had filed the necessary ST-3 returns and has also collected the amounts so paid as service tax from the customers.

6. The show cause notice was issued on 15.12.2009 on the ground that part of the claim is time barred and further that the appellant had collected the service tax amount from its customers. Order was accordingly passed rejecting the total refund claim by the original authority and it was sanctioned to the extent it was filed within one year, by the Commissioner (Appeals) by the impugned order. The amount so sanctioned has been directed to be credited to the consumer's welfare fund.

7. Learned Authorized Representative submits that as per section 11B of the Central Excise Act, the claim of refund has to be made by the person who has paid the tax or has borne the incidence of tax and the claim has to be filed within one year. However, in this case, the appellant has filed the refund claim requesting to grant refund to its customers from whom it had collected the amounts paid as service tax. Such claim is not authorized by section 11B of the Central Excise Act. Refund claim can be filed either by the person who paid the service tax or one who had borne the service tax. Such person has to also establish that he has not passed on the burden of service tax on to somebody else. Otherwise, the refund has to be sanctioned and credited to the consumer welfare fund. By the impugned order, the Commissioner (Appeals) has sanctioned refund claim which was filed within time and ordered it to be credited to the consumer welfare fund and therefore, there is no error in the order itself.

8. He further submits that in this case, the appellant has filed ST-3 returns based on self assessment and has paid service tax accordingly. The question which arises is after such assessment whether a refund claim can be made without first modifying the assessment so made. This issue was decided by the Larger Bench of the Hon'ble Supreme Court in the matter of **ITC Ltd vs Commissioner of Customs**[1]. In this judgment, the Hon'ble Supreme Court considered a batch of appeals covering Customs, Central Excise and Service Tax matters. The common question which was examined and discussed by the Court in the matter is whether after self assessment a refund can be claimed so as to modify the self assessment by the assessee or such an assessment must first be assailed before a higher authority and modified. The larger bench has held that refunds can be sanctioned only if they flow from the assessment already made and they cannot be made so as to modify the assessments (including self assessments). If the assessment is wrongly done resulting in paying a higher amount of customs duty or central excise duty or service tax, the officer sanctioning the refund cannot modify the assessment/self-assessment. The assessment/self assessment must first be assailed before the Commissioner (Appeals). This decision of the Hon'ble Supreme Court has come after the impugned order was passed;

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[1] **2019 (368) ELT 216 (SC)**

nevertheless, it has laid down the law and is binding. Therefore, no refund, whatsoever, could have been sanctioned in this case at all.

9. We have considered the submissions of the learned Authorized Representative and have carefully gone through the records of the case. We find that the impugned order has partly sanctioned the refund and credited it to the consumer welfare fund and partly rejected on the ground of time bar. It is true that the law laid down by the Hon'ble Supreme Court in the case of ITC Ltd, was that no refund to be sanctioned at all unless the assessments (including self assessments) are first assailed before the Commissioner (Appeals) and modified. However, the sanction of refund by the Commissioner (Appeals) has not been assailed by the Revenue either by an appeal or by a separate memorandum of cross objections.

10. Insofar as the application for refund is concerned, section 11B of the Central Excise Act reads as follows:

> *"Section 11B. Claim for refund of duty and interest, if any, paid on such duty -*
>
> *(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on 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 documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :*
>
> *Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :*
>
> *Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.*
>
> *(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :*
>
> *Provided that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions*

of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette."

11. As may be seen, refund claim can be made by the person who paid the excise duty or from whom the excise duty is collected and who has not passed on the incidence to any other person. Since these provisions are made applicable to the service tax by virtue of section 83 of the Finance Act,

1994, refund can also be claimed of service tax by the person who has either paid the service tax or the person from whom the service tax has been collected provided such person has not passed on the incidence to any other person. After examining the refund claim, if it is found admissible and if it is found to have been filed within time, the refund so sanctioned has to be credited to the consumer welfare fund. However, if the claimant proves that it has not passed on the burden to any other person then it shall be paid to the claimant.

12. There is no provision, whatsoever, in section 11B by which one person who has paid the service tax and who has also passed on the burden to others, to file refund claim and request that the refund may be sanctioned and given to its customers. The scheme of the law is that once the applicant has passed on the burden of service tax to anybody, the amount has to be credited to the consumer welfare fund and not paid. If the person who has borne the service tax wants to claim a refund, such person will have to file a refund claim. Therefore, the very request of the appellant before the original authority and the Commissioner (Appeals) and before us that the service tax which it had paid and which it has undisputedly also collected from its customers must be refunded to its customers, is against the statutory provision of section 11B. The provisions of section 11B cannot be modified to cater to the requests of the appellant.

13. We also find that part of the refund claim was filed beyond a period of one year and hence was found to be inadmissible and was rejected by the Commissioner (Appeals).

14. In view of the above, we find no infirmity in the impugned order.

15. The impugned order is upheld and the appeal is rejected.

(Pronounced in the Open Court on 15.09.2022)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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