CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH, COURT NO. 3

SERVICE TAX APPEAL NO. 51683 OF 2017

[Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-167-17-18 dated 30.08.2017 passed by the Commissioner (Appeal) Service Tax, Bhopal]

M/S NIPANI INDUSTRIES **Appellant**

2nd Floor Bhasin Arcade Gorkhpur
Jabalpur

VERSUS

COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, JABALPUR **Respondent**

CR Building Napier Town, Jabalpur

Appearance:
Present for the Appellant : Shri Himanshu Khemuka, Advocate
Present for the Respondent: Ms. Jaya Kumari, Authorised Representative

CORAM:
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51682 /2023

Date of Hearing : 16/10/2023
Date of Decision: 22/12/2023

P V SUBBA RAO

M/s. Nipani Industries, Jabalpur[1] filed this appeal to assail the Order in Appeal dated 30.8.2017 passed by the Commissioner (Appeals) GST, Customs and Central Excise, Bhopal whereby he allowed the Revenue's appeal and set aside the Order in original[2] dated 8.3.2017 passed by the Assistant Commissioner sanctioning refund to the appellant.

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1 **Appellant**
2 **OIO**

2. The appellant is a partnership firm registered with the Service Tax Department and it had provided Works Contract Services for the Central and State Government buildings. These services were exempted from service tax by virtue of notification no. 25/2012-ST dated 20.6.2012 up to 31.3.2015 after which this exemption was withdrawn by notification no. 6/2015 dated 1.3.2015 effective from 1.4.2015. Later, the exemption was restored retrospectively by inserting section 102 of the Finance Act, 1994[3] by Finance Act, 2016. This Section also provided for refund of service tax if paid under a contract entered into before 1st March 2015. It also required that a refund application for it must be made within six months from the date on which the Finance Act, 2016 receives assent of the President of India. This section reads as follows:

> **"SECTION 102.Special provision for exemption in certain cases relating to construction of Government buildings.**
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> (1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of––
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> (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry or any other business or profession;
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> (b) a structure meant predominantly for use as––
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> (i) an educational establishment;
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> (ii) a clinical establishment; or
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> (iii) an art or cultural establishment;
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> (c) a residential complex predominantly meant for self-use or for the use of their employees or other persons specified in Explanation 1 to clause (44) of section 65B of the said Act, under a contract entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date.
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> (2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times.

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3 Finance Act

> (3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of the President."

3. The appellant had paid service tax and hence it filed a refund claim on 16.8.2016. The Assistant Commissioner got the claim verified by the Range Superintendent and sanctioned refund of Rs.68,78,631 of the total claim of Rs.71,03,367 as the rest was rendered on some services not covered by section 102. The Assistant Commissioner also noted the report of the Range Superintendent that the refund application was filed within time, the clause of unjust enrichment and CENVAT credit do not apply to the case, no arrears of Revenue were pending against the appellant and that the documents submitted by the appellant were verified and found authentic and valid.

4. Aggrieved, Revenue filed an appeal with the Commissioner (Appeal) assailing the order of the Assistant Commissioner on the ground that the clause of unjust enrichment would apply to this case but did not dispute the eligibility of the refund on merits. Before the Commissioner (Appeals), the appellant submitted that it had not collected the service tax from the Government Departments to which it had rendered service as is evident from the invoices.

5. The Commissioner (Appeals) did not agree with the submissions of the appellant that it had not collected service tax from its client government departments on the ground that at the time of bidding, the tender notices required the bidders to quote rates inclusive of all duties, taxes, royalties and other levies. He further observed that at the time of bidding, there was no service tax exemption and

therefore, the price quoted by the appellant was inclusive of service tax. He, therefore, held that the appellant had indirectly passed on the burden of service tax. Thus, holding, the Commissioner (Appeals) held that the unjust enrichment clause would apply to this case and the amount of refund sanctioned should have been credited to the Consumer Welfare Fund instead of paying to the appellant. He placed reliance of the judgment of Supreme Court in **Union of India** vs. **Solar Pesticide Pvt. Ltd.**[4] in which it was held that the concept of unjust enrichment would also apply where the incidence of duty is passed on indirectly.

6. Learned counsel for the appellant submitted that the finding in the impugned order that it had indirectly passed on the burden to the government departments is not correct. The Commissioner (Appeals) recorded correctly that its contracts were inclusive of all duties and taxes but his statement that when it had submitted the bids there was no exemption from service tax is incorrect on the face of it. He submits that until 1.4.2015, there was exemption from service tax. It is only from 1.4.2015 that the exemption was withdrawn. Thereafter, the exemption was given retrospectively by section 102 of the Finance Act, 1994. It is for this reason that the refund provision under section 102 provided for refunds only in such cases where the contracts were entered into prior to 1 March 2015 (i.e., at the time when there was an exemption from service tax). It is undisputed that the appellant's refunds met with this condition of the contracts that they should have been made prior to 1 March 2015.Evidently, the bids must have been made prior to the contracts were signed and

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4 2000(116) ELT 401(SC)

exemption from service tax was available at that time also. Therefore, the finding of the Commissioner (Appeals) in the impugned order that at the time the bids were submitted by the appellant, there was no exemption from service tax is incorrect. While section 102 was introduced later in 2016, exemption by notification no. 25/2012-ST was available up to 1.4.2015 and its contracts and bids were made before this date.

7. Learned authorised representative for the Revenue reiterated the impugned order.

8. Having considered the submissions of both sides and perused the records, we find that there is no dispute about the eligibility of refund on merits of the case to the extent it was sanctioned by the Assistant Commissioner. Since the application is made under section 102, all the requirements under the section including that the application must be made within six months from the date of Presidential Assent to the Finance Act, 2016 and that the contracts must have been entered into prior to 1 March 2015 have been fulfilled. The only dispute is regarding the unjust enrichment. According to the appellant since it had not passed on the burden of service tax to its client departments, there is no question of unjust enrichment.

9. Revenue does not dispute that the appellant had not invoiced or collected from its client government departments, the service tax. According to the Revenue, unjust enrichment would apply to this case because the contracts were for an all inclusive price (including duties and taxes) and therefore, the appellant must have had reckoned the

service tax into the total cost while bidding and at the time of bidding, there was no exemption from service tax and therefore, the appellant must have included in its invoice price, the service tax element. **We are unable to agree with this finding because section 102 provides for refunds only if the contracts were signed prior to 1 March 2015. During that period, no service tax was payable because of exemption notification no. 25/2012-ST. So, we find it inconceivable that the appellant would have anticipated that the exemption from service tax would be withdrawn even before submitting its bids and would have included the service tax element in the bills. We find it impermissible to hold that the appellant had indirectly passed on the burden of the service tax to its client government departments. Once this anomalous and baseless presumption that the service tax would have been indirectly passed on by the appellant to its client government departments is removed, no basis remains for rejecting the refund claim or crediting it to the Consumer Welfare Fund.**

10. The Commissioner relied on **Solar Pesticide Pvt. Ltd.** in which the Supreme Court held that the principle of unjust enrichment would apply not only where the imported goods (on which the duty has been paid) are sold but to also to such cases, where the imported goods are used by the importer to manufacture and such manufactured goods are further sold by the importer. In the latter case, the importer may pass on the incidence of duty indirectly to the customer which also falls within the scope of unjust enrichment under section

27 of the Customs Act, 1962. The relevant paragraphs of the judgment are as follows:

> **"20.** We are of the opinion that the aforesaid observations would be applicable in the case of captive consumption as well. To claim refund of duty it is immaterial whether the goods imported are used by the importer himself and the duty thereon passed on to the purchaser of the finished product or that the imported goods are sold as such with the incidence of tax being passed on to the buyer. In either case the principle of unjust enrichment will apply and the person responsible for paying the import duty would not be entitled to get the refund because of the plain language of Section 27 of the Act. Having passed on the burden of tax to another person, directly or indirectly, it would clearly be a case of unjust enrichment if the importer/seller is then able to get refund of the duty paid from the Government notwithstanding the incidence of tax having already been passed on to the purchaser.
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> **21.** Learned Counsel for the respondent had also contended that in cases of captive consumption of imported goods, it would be impossible for the assessee to establish whether the duty component has been passed on to the buyers of the finished products or has been borne by the importer himself. Difficulty in proving that the incidence of the duty borne by the importer has not been passed on to the purchaser of the finished product can be no ground for interpreting Section 27 differently. It is not possible that in no case will an importer not be able to prove that the incidence of the duty imposed on the imported raw material has not been passed on to any other person. In fact in Civil Appeal No. 4381 of 1999 filed by the Commissioner of Customs against M/s. Surya Roshni Limited, the importer had produced certificate from the Chartered Accountants giving details of costing of the final product and the Commissioner (Appeals) found as a fact that the component of excess customs duty paid on the imported raw material had not gone into the costing of the finished product. Without going into the correctness of this finding we wish to emphasize that even in cases of captive consumption, it should be possible for the importer to show and prove before the authorities concerned that the incidence of duty on the raw material, in respect of which refund is claimed, has not been passed on by the importer to any body else.
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> 24. For the aforesaid reasons, we hold that the High Court has not correctly interpreted the relevant provisions of the Customs Act and, in our opinion, the principle of unjust enrichment incorporated in Section 27 of the Act would be applicable in respect of imported raw material and captively consumed in the manufacture of a final product. Whether the incidence of the duty had been passed on to the consumer was not decided by the High Court in Solar Pesticide's case (supra) because in its opinion the principle of unjust enrichment could not apply to the cases of captive consumption. In the case of Solar Pesticide Pvt. Ltd., therefore, we do not go into this question whether the incidence of duty had not been passed on by the respondent. This appeal is, accordingly, allowed and the impugned judgment of the High Court is set aside, the effect of which would be that the writ petition filed by the Solar Pesticide Pvt. Ltd. stands dismissed. Writ Petition (C) No. 189 of 1993 filed by M/s. Solar Pesticides Pvt. Ltd. in this Court also stands dismissed. No costs."

11. The ratio of **Solar Pesticide** is well known and the concept of unjust enrichment applies not only to cases where the duty is collected from the customers directly representing it as duty but also

to such cases where it is indirectly collected by including it as the cost of raw material in the manufacture of final products and such final products are further sold. It is not difficult to ascertain if the duty that has been incurred was included in the cost of raw material or otherwise from the assessee's books of accounts. For instance, if the imported material costs Rs. 100/- on which the importer paid duty of say, Rs. 15/-, if he books the entire Rs. 115/- in his books of accounts as the cost of raw material, evidently, he has passed on the incidence of the duty indirectly to the buyer of the goods. On the other hand, if he is of the opinion that the duty was not payable and it has to be refunded to it, he would book only Rs. 100/- as cost of raw material and Rs.15/- as receivables (because he expects this amount to be received by way of refund from the department). By looking at the books of accounts, the factual position can be ascertained in each case and if the importer fails to establish that the burden of duty has not been passed to the buyer, his refund claim will be hit by unjust enrichment.

12. What distinguishes the present case from **Solar Pesticide** is the fact that no service tax was paid when the appellant submitted its bids to the clients. Therefore, there is no scope for passing on the burden of any service tax at that stage. After the service was rendered, it was only entitled to the amounts which it bid and which were accepted in the contract and not to any additional amount as service tax. The contracts specifically exclude any additional payments towards service tax. The Commissioner's reasoning in the impugned order is based on the presumption as to how the appellant would have decided to bid an amount and we find no room in law to

speculate as to how the bids would have been made by the appellant. It is their business decision and there is no presumption in law that whenever bids are made, elements X, Y or Z have been reckoned. Based on this presumption as to how the appellant would have made its bids and further, based on the factually incorrect assumption that at the time of making the bids, service tax was not exempted and hence would have been reckoned by the appellant while preparing its bids, the Commissioner held that unjust enrichment would apply. As we have found earlier, section 102 applies to only such cases where the contracts were entered into before 1 March 2015 and this condition is undisputedly met. Before 1 March 2015, service tax was exempted by Notification no. 25/2012-ST and therefore, even this second assumption of the Commissioner is wrong.

13. In view of the above, the impugned order deserves to be set aside and is set aside and the appeal is allowed.

[Order pronounced on **22.12.2023**]

(BINU TAMTA)
MEMBER (JUDICIAL)

(P V SUBBA RAO)
MEMBER (TECHNICAL)

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