IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.3

Excise Appeal No.76565 of 2018

(Arising out of Order-in-Appeal No.06/DIB/CE(A)/GHY/18 dated 23.01.2018 passed by Commissioner(Appeals), Central Goods and Service Tax & Excise, Guwahati.)

M/s. Oil India Limited
(Duliajan, Dist.Dibrugarh, Assam-786602.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax Dibrugarh

.....Respondent

(F-Lane, Milan Nagar, Dibrugarh-786003.)

APPEARANCE

Shri Krishna Rao, Advocate for the Appellant (s)

Shri K.Chowdhury, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 75087/2023

DATE OF HEARING : 24 February 2023
DATE OF DECISION : 14 March 2023

P.K.CHOUDHARY :

M/s OIL India Ltd. ('the Appellant') is engaged in the exploration and production of Crude Oil and Natural Gas falling under Chapter 27 of the Central Excise Tariff Act, 1975. The Appellant entered into arrangements with two foreign entities, incorporated abroad for the receipt of certain services. The details of the same are in the paragraphs that follow.

National Oilwell Maintenance Company

2. The Appellant entered into agreement dated 30.04.2014 with National Oilwell Maintenance Company ('NOMC') for the provision of 'cementing services for exploratory drilling'. The said contract at 'Clause (iii) Schedule IV, General Notes for Table A' provided that Service Tax will be extra at OIL's account but the liability for its payment would be on the contractor (i.e. NOMC). In other words, NOMC was to statutorily discharge Service Tax liability and was to then reimburse itself of the same from the Appellant. NOMC is originally based out of Doha located in Qatar.However, it setup an establishment in India at Jodhpur and obtained Service Tax registration. NOMC raised four invoices dated 1.08.2014, 1.09.2014, 1.10.2014 and 1.11.2014 on the Appellant. On 8.03.2016, it discharged Service Tax amounting to Rs. 8,35,576/- and Rs. 7,87,669/- totalling to Rs. 16,23,245/-. The Appellant also discharged Service Tax of these very amounts on 5.12.2014 and 6.01.2015 after entertaining a view that it was liable to discharge Service Tax on reverse charge on the services received. Both NOMC and the Appellant deposited Service Tax with the Department. NOMC then followed up with the Appellant seeking a reimbursement of the Service Tax deposited by it, in terms of the aforesaid contract.

Haliburton Offshore Services Inc

3. The Appellant entered into contract dated 12.08.2011 with M/s Haliburton Offshore Services Inc ('Haliburton') for the provision of 'Installation and Commission' services. Like NOMC, the clause titled 'Duties and Taxes' of the said contract provided that Service Tax was extra at OIL's account. Haliburton was to discharge Service Tax and then the Appellant was to reimburse it of the same. Haliburton raised Invoice dated 19.04.2013 and discharged Service Tax. It deposited an amount of Rs. 48,75,303/- on 3.05.2013, which was its total Service Tax liability for the concerned period. Out of this an amount, Rs.

9,88,184/- pertained to the services rendered to the Appellant.The Appellant, being of the view that it was liable to discharge Service Tax on the said transaction on reverse charge, discharged an amount of Rs. 11,65,152/- on 5.12.2013. The appellant discharged an additional amount of Rs. 1,76,968/- since the exchange rate changed from Rs. 58.55 per US Dollar in May 2013 to Rs. 62.30 per US Dollar in December 2013. Haliburton wrote a detailed email dated 29.01.2014 wherein it explained that it had already discharged Service Tax on the transaction in question. It followed up with the Appellant to reimburse it of the same.

4. The Appellant filed refund claim dated 16.11.2016 of the total Service Tax amounting to Rs. 27,88,397/- paid by it on the aforesaid transactions. Thereafter it received Show Cause Notice dated 12.04.2017 proposing to reject its claim on certain grounds. It was alleged that the appellant failed the bar of unjust enrichment. It was also alleged that, there was no evidence of double payment and in any event the refund claim filed was time barred. It seemed that the amounts deposited by the Appellant and Haliburton did not match. The Appellant responded to the same vide its reply dated 24.04.2017/17.05.2017, explaining its stand.

5. Thereafter Order in Original dated 31.08.2017 was passed against the Appellant by the Assistant Commissioner Central Goods and Services Tax, Dibrugarh. It was noticed that the contractual liability of payment of Service Tax was on the contractors. However, curiously it was still observed that the Appellant paid Service Tax to the Department, as per the agreements wilfully and not by mistake. It was held that no evidence was submitted by the Appellant to establish that Service Tax was reimbursed to the contractors by the Appellant. Further it was observed that the accounting codes on challan paid by the Appellant and Haliburton did not match. Moreover, it was observed that NOMC took credit of output service provided and reversed it only when there was an objection raised by the Department. Finally, it was

observed that the email from M/s Haliburton came on 29.04.2014 seeking release of payment of Service Tax portion for invoice no. 99418507. Thus, the Appellant should have applied for refund within the time frame stipulated in Section 11B of Central Excise Act. The Appellant appealed against OIO dated 31.08.2017 before the Commissioner (Appeals) Central Goods and Services Tax &Excise Dibrugarh.

6. The Commissioner (Appeals) vide Order in Appeal No. 06/DIB/CE(A)/GHY/18 dated 23.01.2018 dismissed the Appellant's appeal. The appellate authority relied on Section 68(2) of Finance Act, 1994 and Notification 30/2012 to hold that Service Tax was payable on reverse charge by the recipient from entities located abroad and thus the Appellant correctly discharged Service Tax. Reliance was further placed on SNC Lavalin Inc. vs. Commissioner Service Tax, Delhi – 2013 (32) STR 376 to hold that a project office cannot be called a permanent establishment of the company.However, this order is an order granting interim stay and cannot be considered to have precedential value. It was finally held that the Appellant erred in relying on limitation period stipulated in Section 17(1)(c) of the Limitation Act. To rely on the said limitation period, the Appellant ought to have filed a civil suit and not before an authority exercising powers under Finance Act, 1994 and Central Excise Act, 1944.

7. Shri Krishna Rao, Ld. Advocate appeared for the Appellant and Shri K. Chowdhury, Ld. Authorized Representative appeared for the Revenue.

8. The Ld. Advocate for the Appellant submitted that both NOMC and Haliburton setup establishments in India, categorically took Service Tax registration and discharged Service Tax on the services rendered by them. They did so, correctly under Explanation 4 to

Section 65B(44) of the Finance Act, 1994 which provides that a service provider operating through a branch, agency or representational office in a territory is to betreated as having an establishment in that territory. He relied on ***Nagarjuna Oil Corporation Ltd. vs. CCE Puducherry [2017 (47) S.T.R. 96 (Tri. Chennai)]*** in support of the said contention. He further relied on the judgment of **Dinesh Textiles vs. CCE Calicut –2019 (366) ELT 3 (SC)** in support of the general proposition that deeming fictions are to be carried to their logical end.

9. It was further contended that the Appellant discharged Service Tax under reverse charge, on the aforesaid transactions under a mistaken apprehension. Since it was never liable to discharge Service Tax to begin with, the amount paid by it under mistake of law, was never a 'tax'. That being so, all trappings that apply to a 'tax', including that of limitation under Section 11B,were not applicable to the Appellant's refund claim and thus the Appellant's claim ought not have been rejected. He relied on several judgments including those of***Parijat Constructions vs. CCE, Nashik [2018 (9) G.S.T.L. 8 (Bom.)], KVR Constructions vs. CCE Bangalore [2010 (17) S.T.R. 6 (Kar.)], M/s Credible Engineering Construction Projects Limited vs. Commissioner of Central Excise, Hyderabad-GST [Service Tax Appeal No. ST/ 30781/2081]*** and***Oriental Insurance Company Limited vs. Commissioner of Central Excise & Service Tax [Service Tax Appeal No. 51609 of 2016]*****.**

10. It was also contended that the bar of unjust enrichment was inapplicable in the present case. There was no allegation or finding against the Appellant that the Appellant priced the crude oil extracted by it in such a way that it also factored in the Service Tax paid by it on reverse charge. In any case, no such inference was sustainable because the price of crude oil is regulated by the Government based on international crude oil prices. Reliance was placed on Circular No. P-

20012/11/2006-PP dated 01.05.2009 issued by the Ministry of Petroleum & Natural Gas which provided that only Sales Tax and Pipeline Transportation Charges are to be paid by the refineries (and not Service Tax). The above concept was reiterated yet again in Circular No. P-20012/11/2006-PP Volume 1 issued by Ministry of Petroleum and Natural Gas dated 21.03.2011. The Crude Offtake Sales Agreements between the Appellant and its subsequent buyers i.e. Indian Oil Corporation Limitedand Numaligarh Refinery Limited, based on the ratios of the aforesaid Circulars, also established that Service Tax never formed part of the valuation mechanism. For instance, clause 10.1 of the IOCL contract provides that the Appellant would bear all taxes except for those mentioned in Schedule B. A look at Schedule B would indicate that there was no mention of Service Tax whatsoever. Further, clause 4 of Schedule B provides that only VAT has to be discharged by the buyer. The counsel for the Appellant also relied on the judgment of ***State of Rajasthan vs. Hindustan Copper (1998 (9) SCC 708*** in support of the contention that when taxes do not form part of the valuation mechanism, there is no question of unjust enrichment.

11. Ld. Authorized Representative for the Department supported the Orders passed by the concerned authorities. He also relied on several judgments to contend that the conditions and prescriptions of Section 11B would apply to amounts paid by assessees under a misinterpretation of the statutory provisions.

12. Heard both sides and perused the appeal records.

13. I find that the present case is one where the service providers (i.e. NOMC and Haliburton) as also the service recipient (i.e. the Appellant) have discharged Service Tax on the same transaction and each party has deposited the said tax with the Department. The

Department has received the amounts in question twice over and there is no inter-se reimbursement of the said tax between the parties. Though contractually it was the service providers who were to discharge the tax, since they had establishments in India, and then recover the same from the Appellant, the Appellant entertained a view that it was supposed to discharge Service Tax on reverse charge and directly paid the same to the Department.

14. In order to examine as to which party was statutorily liable to discharge Service Tax, it becomes relevant to examine Explanation 4 to Section 65B(44) of the Finance Act, 1994, which has been extracted below:-

> "Section 65B(44)
>
> …
>
> **Explanation 4**.- **A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;"**

15. As is evident from the record,NOMC and Haliburton setup establishments in Jodhpur and Bombay respectively, obtained Service Tax registrations and discharged Service Tax. They did this correctly, in terms of the plain language of Explanation 4 to Section 65B(44). The record also indicates that communications were exchanged between the branch offices and the Appellant. Moreover, the labour force to carry out the concerned work was also sourced domestically. I find that Tribunal in the case of ***Nagarjuna Oil Corporation Ltd. vs. CCE Puducherry [2017 (47) S.T.R. 96 (Tri. Chennai)]***has held that when branch offices of foreign service providers obtained registration and discharged Service Tax in India on the transaction in question, the service recipient located in India (the assessee in that case) was not required to discharge the same,on reverse charge. The Tribunal was interpreting the language of the erstwhile Section 66A,

which is*parimateria* to Explanation 4 to Section 65B(44). Relevant portions of the said judgement are extracted below:-

> *"5. The only point for determination is the appellant's liability to service tax on reverse charge basis in terms of Section 66A. The admitted facts are that there is an agreement between the appellant and NOC BV, Netherlands. NOC BV, Netherlands has an establishment in India recognized by various authorities in terms of applicable regulations. The Indian establishment of NOC BV, Netherlands have registered themselves with the service tax department and remitted the full tax liability with reference to the impugned contract. The original authority while taking cognizance of the existence of NOC BV in India, proceeded to confirm the service tax demand on the basis that the agreement is with NOC BV, Netherlands and the consideration is paid in foreign exchange. We find that Explanation 1. - under Section 66A stipulated that "a person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country." In the instant case, NOC BV Netherlands is admittedly having a business establishment in India recognized by various law. The service is rendered through such establishment in India. This much has been recognized by the original authority in Para 20 of his order. The reliance placed by the original authority on Board's Circular dated 6-5-2011 is misplaced. The said Circular is not on the scope of Section 66A. We find that the original authority has misdirected in his finding despite of his recognition of the Indian establishment of NOC BV as service provider.*

16. In view of the above, I find that the Appellant was not required to discharge Service Tax on reverse charge on the said transaction and it did so under a mistake of law.

17. 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.

18. This principle was laid down by the Hon'ble Karnataka High Court in *KVRConstructions vs. CCE Bangalore [2010 (17) S.T.R. 6 (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. Incase, 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…."

19. The said principle was followed by this Tribunal in the following judgments: -

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."

20. The High Courts of Bombay, Madras, Telangana and Calcutta 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. VasudhaBomireddy 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 cesti qui 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."*

21. Without multiplying the examples, other judgments on the issue at hand, relied upon by the Appellant are listed below:-

i. ***National Institute of Public Finance and Policy vs. Commissioner of Service Tax [SERTA 13/2018]***

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

iii. ***KVR Constructions vs. CCE Bangalore [2010 (17) S.T.R. 6 (Kar.)]***

iv. ***M/s Credible Engineering Construction Projects Limited vs. Commissioner of Customs & Central Excise (Appeals), Hyderabad [Service Tax Appeal No. 30781 of 2018] – Order dated 25.09.2020 and Final Order dated 5.09.2022.***

v. ***Oriental Insurance Company Limited vs. Commissioner of Central Excise & Service Tax [CESTAT Delhi - Service Tax Appeal No. 51609 of 2016]***

vi. ***M/s Ratannindia Power Ltd. vs. Commissioner of Customs, Central Excise & Central GST, Delhi [CESTAT Delhi Service Tax Appeal No. 52244 of 2021]***

vii. ***M/s Techno Agri Sciences Ltd. vs. C.C.E. Chandigarh-I [CESTAT Chandigarh - Appeal No. ST/61441/2018]***

viii. ***M/s Radiant Textiles Ltd. vs. CCE, Ludhiana [CESTAT Chandigarh- Appeal No. ST/60801/2018]***

ix. ***M/s Chattisgarh Civil Supplies Corporation Limited vs. Commissioner of Central Excise and Service Tax [CESTAT Delhi - Service Tax Appeal No. 51616 of 2019 (SM)]***

x. ***Kerala Ex-Servicemen Welfare Association vs. Commissioner of Central Tax & Central Excise, Cochin [CESTAT Bangalore- Service Tax Appeal No. 20259 of 2021]***

xi. ***Dexterous Products Pvt. Ltd. vs. C.C.E. & S.T., Indore [CESTAT Delhi - Service Tax Appeal No. 20259 of 2021]***

22. The Ld. Authorized Representative for the Revenue cited several judgments which have been considered below.

23. The judgment of ***Mafatlal Industries vs. UOI [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.

24. The Kerala High Court held that the statutory limitation period would apply refunds of tax paid erroneously in its judgment in ***Southern Surface vs. Ast. Commissioner, Muvattupuzha - 2019 (28) GSTL 202 (Ker.)]***. However, interesting, in the subsequent judgment of ***Uniroyal Marine Exports Ltd. Vs. CCE Kozhikode- 2021 (54) GSTL 156 (Ker.)*** it was held that if the Department had already granted a refund of the amount mistakenly paid by the assessee, the same is notto be recovered.

25. The judgments of CESTAT Mumbai in ***Benzy Tours vs. Commissioner of Service Tax Mumbai [2016 (43) STR 625 (Tri. Mum)]***, ***Casa Grande vs. Commissioner CGST Mumbai South[2019 (29) GSTL 349 (Tri.- Mum)]*** and **Tanna Electric vs. Commissioner CGST Mumbai Central [2020 (35) GSTL 129 (Tri-Mum)]** are contrary to the ratio of the jurisdictional High Court in ***Parijat Construction supra***.

26. The judgment of the Hon'ble Delhi High Court in ***Jumax Foam Pvt. Ltd. vs. UOI [2003 (157) ELT 252 (Del.)]*** held that refunds could only be claimed under Section 11B. It is to be noted that the Petitioner in that case, was unable to discharge the burden of unjust enrichment in that case. However, subsequently the Hon'ble Delhi High Court in **National Institute of Public Finance and Policy vs. Commissioner Service Tax – SERTA** and **Teleecare Network India Pvt. Ltd. Vs. Union of India – 2019 (368) ELT 36 (Del.)** held that refunds of amounts paid under mistake of law would not be governed by the statutory limitation periods.

27. The judgment of **Jodhpur Vidyut vs. CCE Jaipur [2017 (48) STR 286 (Tri-Del)]** by CESTAT Delhi was decided on 25.11.2016 holding that refund claims ought to only be filed under Section 11B. However, subsequently CESTAT Delhi in the case of **Oriental**

Insurance Co. Ltd. Vs. CCE– Service Tax Appeal No. 51609 of 2016– judgment dated 9.01.2020 examined several judgments on the issue including theLarger Bench judgment of**Veer Overseas vs. CCE Panchkula [2018 (15) GSTL 59 (Tri. LB)]**. The Tribunal, noted the dissenting opinion of the Hon'ble Third Member in **Veer overseas *supra***, wherein it was observed that the Bombay High Court in the cases of **Parijat Construction *supra***and **SGR Infratech**had held that the statutory limitation period would not be applicable to amounts paid under mistake of law. Most importantly, the High Court did so in its appellate capacity and not under writ jurisdiction. Thereafter the Tribunal proceeded to hold in favour of the assessee. Relevant portions of the said judgment are extracted below:-

> *"33. It is therefore clear from the aforesaid decisions relied on by the Appellant that when Service Tax is not leviable, but is deposited mistakenly by the Appellant, the provisions of Section 11B of the Excise Act relating to limitation would not be applicable. In the instant case, the Commissioner (Appeals) has rejected the refund claim of the Appellant only for the reason that it was made beyond a period of one year from the date of payment of duty.*
>
> *34. The order passed by the Commissioner (Appeals) cannot therefore be sustained and it is accordingly set aside. The appellant would be entitled to refund of the claim with interest. The appeal is, accordingly, allowed."*

28. In similar vein, it is noticed that the judgments of ***National Institute of Public Finance supra, Way2wealth Brokers Pvt. Ltd. supra*** and***3E Infotech supra*** are more instances of the High Courts dealing with the concerned issue, in their appellate capacity and not under writ jurisdiction.

29. 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."

30. 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 assessee. 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.

31. 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.

32. Examining the question of unjust enrichment, I find that the appellant in its ledger accounts first discharged the Service Tax and

thereafter appended certain notings in front of the said amounts stating "on hold". It is also clear that the amounts have not been expensed out as the appellant is awaiting the outcome of the litigation. Hence the amount of Service Tax paid cannot be said to have been passed on to anyone.

33. Moreover, the Ministry of Petroleum vide clarifications dated 1.05.2009 and 25.03.2011 has held that the refineries are only liable to discharge Sales Tax and Pipeline TransportationCharges. There is no mention of Service Tax in the same. Moreover the Crude Offtake Sales Agreements between the Appellant and Indian Oil and Numaligarh Refinery Ltd., at the relevant clauses only provide for VAT to be paid by the Appellant's buyers. In view of the same, I find that Service Tax paid by the Appellant never formed part of the crude oil sold by the Appellant. The judgment of Hon'ble Supreme Court in **State of Rajasthan and Ors. Vs. Hindustan Copper Ltd. – 1998 (9) SCC 708** is applicable to the present case and has been extracted below:-

> *"2. On the question of refund, an affidavit of Shri Prashant Swarup, authorised representative of the respondent, has been filed wherein it has been stated that there is no question of any unjust enrichment of the respondent as a result of the refund of the excise duty paid on rectified spirit because the respondent has not passed on the duty to any consumer of the final product, viz., copper, manufactured by the respondent. It has been stated in the said affidavit that the price of copper has always been fixed by the Mineral & Metal Trading Corporation (MMTC) on the basis of the prevailing price fixed by the London Metal Exchange (LME) and this was done not only for the period in question but also for prior and subsequent period and that only such price could be charged and that no part of the duty in respect of rectified spirit captively consumed in the manufacture of copper could be added to the price of copper which was fixed on the basis of the LME prices. We have no reason to doubt the correctness of the aforesaid statement contained in the said affidavit. In the circumstances, no case is made out for interference with the direction contained in the impugned judgment of the High Court regarding refund of excise duty paid by the respondent on import of rectified spirit used in the manufacture of copper. The appeals are, therefore, dismissed. No order as to costs."*

34. In view of the above discussions, the present appeal is allowed. The appellant shall be entitled to the refund amount along with interest.

(Order pronounced in the open court on 14 March 2023.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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