CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI
WEST ZONAL BENCH

Service Tax Appeal No. 85076 of 2021

(Arising out of Order-in-Appeal No. DL/56/APPEALS THANE/MC/2020-21 dated 10.09.2020 passed by the Commissioner (APPEALS THANE, CGST & Central Excise, Mumbai)

M/s. Raheja Regency Cooperative Housing Society ltd. **.....Appellant**
106, CS No. 406/6, Sion Divion,
Road no. 29, Sion East,
Mumbai

VERSUS

Commissioner of GST & Central Excise, Mumbai **.....Respondent**
12th Floor, Lotus Info Centre,
Station Road, Parel East,
Mumbai

APPEARANCE:

Shri Bharat Raichandani, Advocate a/w Ms. Diksha Kukrety, Advocate for the appellant
Shri Prabhakar Sharma, Supdt. (AR) for the respondent

CORAM:
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/86159 / 2022

DATE OF HEARING : 16.11.2022
DATE OF DECISION : 08.12.2022

Per: AJAY SHARMA

Appellant herein has filed the instant appeal challenging the Order-in-Appeal dated 10.9.2020 passed by the Commissioner (Appeals-Thane), CGST & Central Excise, Mumbai

by which the learned Commissioner in a denovo proceedings as remanded by this Tribunal, rejected the appeal filed by the appellant and upheld the order of Adjudicating Authority rejecting the refund claim filed by the appellant.

2. The facts leading to the filing of the instant appeal are stated in brief as follows. The Appellant is providing the services under the category of *Club or Association Services* and is a Society Registered under the provisions of Maharashtra Cooperative Housing Society Act, 1960. They have filed two refund claims on 2.12.2016, one for Rs.7,68,950/- for the period 2014-15 and another for Rs.9,22,795/- for the period 2015-16 on the ground that they have paid service tax under protest as they are Co-operative Society not engaged in any activity of profit and as per the *principle of mutuality,* services provided by them to their members would not be liable to Service tax under the *Club or Association Service*. Since the department was of the view that the grounds of refund claims are not sustainable and liable for rejection therefore a show cause notice dated 4.1.2017 was issued to the Appellant to clarify as to why the refund claim should not be rejected on merits as well as on the ground of limitation in terms of Section 11B of the Central Excise Act, 1944 as applicable to service tax vide Section 83 of the Finance Act, 1994. The Adjudicating Authority vide Order-in-Original dated 28.2.2017 rejected the refund claims on the ground of limitation u/s. 11B ibid as made applicable to Service Tax matters and also on merits by applying the provisions of Section 66B & 66D of

Finance Act, 1994. On Appeal filed by the Appellant the learned Commissioner (Appeals) vide order dated 24.7.2018 rejected the appeal filed by the appellants. On Appeal filed by the Appellant before this Tribunal, the Tribunal vide order dated 4.7.2019 remanded the matter back to the Commissioner with a direction to decide the appeals afresh since the learned commissioner failed to record any findings on the specific submission of the appellant on the *principle of mutuality*. Upon remand the learned commissioner again rejected the appeal filed by the appellant by holding that the *principle of mutuality* is not applicable and the appellants have correctly discharged the service tax as due from them in terms of service tax provisions and service tax paid thereto would not be payment due to *mistake of law* and there will be no refund u/s. 11B.

3. Learned counsel for the appellant submits that the appellant is a society registered under the provisions of the Maharashtra Co-operative Housing Societies Act, 1960 and its members are from the society itself and therefore liability to pay service tax would not arise as the said tax is payable only when a taxable service is provided by one person to another. He further submits that the learned Commissioner erred in rejecting the application of *principle of mutuality* in the instant matter. He also submitted that for the subsequent period also i.e. 2016-17 in appellant's own case this Tribunal remanded the matter back to the Commissioner and upon remand, the learned Commissioner (Appeals) therein vide Order-in-Appeal dated

14.6.2021 allowed the appeal filed by the appellant claiming refund by applying the *principle of mutuality* and the Adjudicating authority vide order dated 26.8.2021 has sanctioned the said refund along with interest. As per learned counsel no service tax is leviable on transaction between a member and an incorporated society and in support of his submission the learned counsel placed reliance on the following decisions:-

(i) *State of West Bengal & Ors. vs. Calcutta Club Ltd. & Ors.; 2019-TIOL-449-SC-ST-LB* and also
(ii) The Joint Commercial Tax Officer vs. The Young Mens' Indian Association MANU/SC/0472/1970
(iii)Ranchi Club Ltd. vs. Chief Commr.; 2012(26)STR 401 (Jhar)
(iv) Sports Club of Gujarat vs. Union of India; 2013(32)STR 645 (Gujarat)
(v) Tanhee Heights Co-operative Housing Society Ltd. vs. Commr. CGST 2018-TIOL-3296-CESTAT-MUM

4. According to learned counsel since the amount of service tax was paid under protest therefore the period of limitation as prescribed u/s. 11B ibid would not apply to the facts of the case and otherwise also neither the adjudicating order nor the impugned order raised any issue regarding the time bar claim and since the revenue has not challenged the impugned order therefore they cannot be permitted to argue on the issue of limitation. Per contra learned Authorised Representative appearing on behalf of Revenue drew my attention towards

paragraph 14 of the Adjudicating order which specifically dealt with the limitation issue although he failed to point out any finding on limitation from the impugned order. According to learned Authorised Representative the appeal is not sustainable on the ground of limitation as rightly held by the Adjudicating Authority and upheld by the learned Commissioner (Appeals). He further submits that non-compliance to the limitation provisions u/s. 11B ibid resulted in rejection of the refund claim and accordingly the present Appeal is liable to be rejected.

5. I have heard learned counsel for the appellant and learned Authorised Representative for the Revenue and perused the case records including the synopsis/written submissions and the case laws cited by the respective sides. Through various decisions of the Hon'ble Supreme Court as well of the Hon'ble High Court and of course of the Tribunal, it is settled legal position that a club incorporated and formed on *principle of* mutuality, is not liable to pay Service Tax on services provided to its members inasmuch as it is not a service by one legal entity to another and though the club had distinct legal entity, it was acting only as an agent for its members. The Hon'ble Larger Bench of the Supreme Court in the matter of *Calcutta Club Limited (supra)* while following its decision in the matter of *Young Men's Indian Association (supra)* has laid down that from 2005 onwards, the Finance Act, 1994 does not purport to levy service tax on members' club in incorporated form and held that show cause notices, demand

notices and other action taken to levy and collect service tax from incorporated members' club are void and of no effect.

6. The issue whether the services provided by the Housing Society to its members falls within the taxable net, came up for consideration before this Tribunal in the matter of *Tahnee Heights Co-operative Housing Society Ltd. vs. Commr. of CGST, Mumbai South; 2019 (21) GSTL 440 (Tri.-Mumbai)*and it has been held by the Tribunal that the activities undertaken by the appellant therein should not fall within the scope and ambit of taxable service, for payment of service tax. The relevant paragraph of the said decision read as under:-

" xxx xxx xxx

7. On reading of the above statutory provisions, it transpires that there is no much of difference for recognition of the taxable service in dispute, for levy of service tax, under both the un-amended and amended provisions of the service tax statute. In order to be categorized as a "taxable service", there must be existence of two parties, i.e. the service provider and the service receiver. As far as the relationship between an incorporated society or club and its members is concerned, it is an undisputed fact that such incorporated association is a distinct legal entity. However, since the association was formed or constituted and existed for the exclusive purpose of catering/meeting to the requirements of its members, as per the laid down policy in the bye law, it cannot be said that there is involvement of two persons, one to be termed as the service provider and the other as the service receiver. Thus, the incorporated association and its member being one and the same, the activities undertaken or the services provided by

the former will not be considered as a service, exigible to service tax under the principle of mutuality.

8. Considering various judgments delivered by Hon'ble Supreme Court and the Hon'ble High Courts on the issue of principle of mutuality vis-a-vis leviability of tax on the club or association service, this Tribunal in the case of *Federation of Indian Chambers of Commerce & Industry* (supra) has held that on application of the principle of mutuality, services provided by clubs/associations to their respective members would not fall within the ambit of the taxable "club or association" service. Further, in the case of *Matunga Gymkhana* (supra), this Tribunal has also taken the similar view. Though the said decisions were rendered under the un-amended definition of taxable service (effective up to 30-6-2012), but the ratio laid down therein is squarely applicable to the post amended definition of "service" contained in the negative list regime (w.e.f. 1-7-2012), inasmuch, in absence of presence of both service provider and service receiver, the transaction cannot be statutorily terms as taxable service and will not be exigible to service tax. Even under the negative list regime, for the period from 1-10-2015 to 31-3-2016, this Tribunal in the case of *Rajpath Club Ltd.* (supra) has concurred with the earlier referred decisions of the Tribunal.

9. Coming to the issue of ascertaining the status of the appellant, whether an incorporated body or otherwise, for the purpose of consideration of applicability of explanation 3(a) appended to Section 65B of the Act, I have examined the relevant provisions of the Act of 1960 and the model bye laws provided therein. Under Section 36 in the Act of 1960, it has been provided that "*the registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to ……and to do such other things as are necessary for the purpose for which it is constituted*". Further, clause 67 of Maharashtra Co-operative Housing Society Bye Laws, formulated under the Act of 1960 earmarked the charges, in the form of contribution to be collected from the members of the

society, which relates *inter alia,* for payment of property taxes, water charges, common electricity charges, contribution to repair and maintenance fund, contribution to sinking fund, service charges etc. Clause 69 of the said Bye law also provides that the committee shall apportion the share of each member towards the charges of the society on the basis mentioned therein.

10. On perusal of the above statutory provisions, it reveals that upon registration of the society, the same is legally accepted as a body corporate and thereafter, its function and operation are strictly guided as per the laid down bye laws, provided for the purpose. In this case, it is no doubt, a fact that the appellant is a co-operative society and is duty incorporated under the Act of 1960. The appellant also do not provide any services to its members, who pay the amount towards their share of contribution, for occupation of the units in their respective possession. Further, the fact is also not under dispute that the appellant do not provide any facilities or advantages for subscription or any other amount paid. Thus, under such circumstances, the appellant cannot be termed as an unincorporated association or a body of persons, for the purpose of consideration as a 'distinct person'. Accordingly, the explanation furnished under clause 3(a) in Section 65B of the Act will not designate the appellant as an entity, separate from its members. Furthermore, the purpose for which the appellant's society was incorporated, clearly demonstrate that it is not at all providing any service to its members and the share of contribution is to meet various purposes as stated above. Therefore, I am of the considered view that the case of the appellant is not confirming to the requirement of 'service', as per the definition contained in Section 65B(44) of the Act.

11. In view of the foregoing discussion and analysis, it is concluded that the activities undertaken by the appellant should not fall within the scope and ambit of taxable service, for payment of service tax. Therefore, service tax amount paid by the appellant should be eligible for refund. Accordingly, the impugned order is set aside and the appeals are allowed in favour of the appellant."

7. In view of series of decisions it is clear that the appellant cannot be said to be liable to pay service tax in any manner whatsoever inasmuch 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 hit by 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, the authority concerned has no right to retain the same. A similar view has been taken by the Hon’ble High Court

of Judicature at Bombay in the matter of *Parijat Construction* v. *Commissioner Excise, Nashik*, reported in 2018 (359) E.L.T. 113 (Bom.). by holding that limitation prescribed under Section 11B of Central Excise Act, 1944 not applicable to refund claims for Service Tax paid under mistake of law. The relevant paragraphs of the said decision are reproduced as under:-

> "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.
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> 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."

8. Hon'ble High Court of Judicature at Madras in the matter of *3E Infotech Versus CESTAT, Chennai; 2018 (18) G.S.T.L. 410 (Mad.)* also took similar view on identical issue and held 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. The relevant paragraphs of the said decision are reproduced as under:-

> "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.
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> 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.
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> 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:-
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> (a) The Application under Section 11B cannot be rejected on the ground that is barred by limitation, provided for under Section.
>
> (b) The claim for return of money must be considered by the authorities."

9. On similar lines, this Tribunal also in the matter of *Javed Akhtar vs. CGST, Mumbai West; [2021] 132 taxmann.com 166 (Mumbai - CESTAT) in Service Tax Appeal No. 85611 of 2019, vide order dated 09.11.2021* has held that retention of any amount by the department which was paid by the appellant therein without any liability or in excess of the liability violates Article 265 of the Constitution of India.

10. Since as per the settled law the appellant was not liable to pay any tax therefore whatever has been paid by them was due to mistake of law. If that is so then the limitation as prescribed by section 11B ibid is not applicable at all. Although it is the case of the appellant that they have informed the authorities concerned vide communication dated 25.11.2015 about the payment of service tax *under protest*, but the same was not believed by the adjudicating authority as the appellant failed to produce any acknowledgement of the same. As it has already been observed that in the facts of the present case Section 11B ibid has no application, therefore I am not getting into this issue whether any communication was sent by the appellant or not.

11. Therefore in view of the discussions held in the preceding paragraphs, I am of the considered view that the appellant is entitle for refund as claimed by them. Accordingly, the appeal filed by the appellant is allowed, with consequential relief, as per law.

(Pronounced in open Court on 08.12.2022)

(Ajay Sharma)
Member (Judicial)

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