

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH - COURT NO. II**

Service Tax Appeal No. 50098 of 2022

(Arising out of Order-in-Appeal No. 313(SM)/ST/JPR/2021 dated 27.09.2021 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur)

M/s Sarovar Portico

88-90, Bhan Nagar, Queens Road,
Jaipur, Rajasthan-302021

Appellant

VERSUS

**Commissioner, Central Excise &
CGST-Jaipur I**

NCRB, Statue Circle,
Jaipur-302005

Respondent

APPEARANCE:

Mr. Tej Narayan Saini, Advocate for the Appellant

Mr. Mahesh Bhardwaj, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50095 / 2023

Date of Hearing: 30.01.2023

Date of Decision: 30.01.2023

ANIL CHOUDHARY:

Heard the parties.

2. The issue in this appeal is whether the amount of refund has been rightly credited to Consumer Welfare Fund on the ground of unjust enrichment.

3. The brief facts are that the appellant is registered with the service tax department and running the business of hotel. Pursuant to audit, it was pointed out that for the period October 2013 to March 2016, the appellant have made in room sales (mini bar)

valued at Rs. 1,06,36,365/- on which they were required to pay service tax, subject to abatement. Accordingly, the appellant on being so directed deposited the amount of service tax Rs. 4,71,017/- alongwith interest of Rs. 1,85,770/-, totalling Rs. 6,56,787/-. Thereafter, show cause notice dated 08.03.2017 was issued. The SCN was adjudicated on contest and the demand was dropped vide OIO dated 31.05.2017. Thereafter, the appellant applied for refund on 05.02.2020. The appellant had also submitted a certificate of Chartered Accountant certifying that no part of the amount under refund have been passed on to any other person. The appellant also furnished their profit and loss account & balance sheet. The refund claim was adjudicated vide O-I-O dated 18.05.2020, whereby the Assistant Commissioner was pleased to grant the refund, the Assistant Commissioner recorded the finding that the assessee had deposited the amount under protest, and as such, there is no time bar.

4. Being aggrieved, revenue preferred appeal before the Commissioner (Appeals) on the ground of unjust enrichment. The Commissioner (Appeals) was pleased to observe that in the facts of the present case, as the appellant have debited the said amount in their profit and loss account, it amounts to passing on the incidence indirectly, and accordingly, they have not passed the bar of unjust enrichment. Accordingly, he modified the Order-in-Original and directed that the amount is liable to credit to Consumer Welfare Fund.

5. Being aggrieved the appellant-assessee is before this Tribunal inter alia on the ground that admittedly, the appellant have paid the amount at the investigation stage, pursuant to audit objection, under protest. Further, there is no evidence that the appellant have collected this amount from their customer. Admittedly, the services or sale are provided to the customer in past, prior to audit, wherein service tax liability was disputed. Only for the reason that the appellant have debited such amount paid under protest, in profit and loss account, does not amount to passing on the duty liability to any other person. The presumption under Section 12B of the Central Excise Act, provides that every person who has paid the duty of Excise of goods under this Act shall unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

6. For attracting this presumption under Section 12B, the condition precedent is that the appellant should have charged the amount of duty or tax in the invoice. Accordingly, in the facts and circumstances, the court below have erred in concluding that the presumption under Section 12B is attracted and it is deemed that the burden of duty have been passed on. Accordingly, he prays for allowing the appeal.

7. Learned AR for revenue relies on the impugned order and urges that as the appellant have debited the amount in the profit and loss account, the appellant have indirectly passed on the incidence of duty to their customers.

8. Having considered the rival contentions, I find that admittedly, appellant have not charged service tax under dispute in their invoices. Further, admittedly these amounts were paid under protest at the investigation stage and thereafter, the show cause notice was issued. In these circumstances, I hold that only by way of bit in profit and loss account, it does not amount to passing of the burden to a third person or the customer indirectly. An assessee is always at liberty to right back the expenditure debited in profit and loss account by way of adjustment in their capital account.

9. In view of my aforementioned findings and observations, I allow this appeal and set aside the impugned Order-in-Appeal. The appellant is entitled to consequential benefits.

10. The Learned Chartered Accountant, Mr. Tej Narayan Saini has appeared before this Tribunal without being properly dressed. Accordingly, cost of Rs. 2,000/- is imposed. He is directed to deposited Rs. 2000/- in 'Prime Minister Cares Fund' within a period of 15 days from today, and file compliance report before A.R. (Adm) of this Tribunal.

(order dictated in the open Court)

Anil Choudhary
Member(Judicial)