IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No.75972 of 2021

(Arising out of Order-in-Appeal No.39/SH/CE(A)GHY/2020 dated 27.11.2020 passed by Commissioner (Appeals) of CGST & Excise, Customs, Guwahati)

M/s Techno Power Enterprises Private Limited
Mahalaya Road, Dibrugarh HO, Dibrugarh,Dist.-Dibrugarh, Assam-786001

Appellant

VERSUS

Commissioner of CGST & Excise, Dibrugarh
H.No.30, Lane "F" Milannagar, C.R.Building, Dibrugarh-786003

Respondent

APPERANCE :

S/Shri G.Natarajan & Kartik Jindal, both Advocates for the appellant
Shri K.Chowdhury, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.75530/2022

DATE OF E-HEARING : 07.04.2022
DATE OF PRONOUNCEMENT : **16 SEPTEMBER 2022**

PER P.K.CHOUDHARY :

The instant appeal has been filed by the assessee, M/s. Techno Power Enterprises Pvt. Ltd., against Order-in-Appeal dated 27.11.2020 whereby the Ld. Commissioner (Appeals), Guwahati, has rejected the Appeal filed by the assessee against denial of refund of Rs.46,71,827/-. The said Appeal was filed against the Order-in-Original dated 13.01.2020 wherein the Ld. Assistant Commissioner, CGST, Dibrugarh, had declined the aforesaid refund claim of the assessee.

2.1 The Appellant filed a claim for refund of service tax on 14.10.2019 on the ground that service tax was wrongly deposited by them on warehousing services provided by them to M/s.Haryana State Co-operative Supply and Marketing Federation Limited, which was squarely

covered under the Negative list of services on which no service tax was payable. Section 66D of the Finance Act, 1994 prescribes the negative list of services which inter-alia includes "(v) Loading, unloading, packing, storage, or warehousing of agricultural procedure". The wrong payment on aforesaid services came to the knowledge of the Appellant when the client disputed the charging of service tax on warehousing services provided for storage of food grains.

2.2 The Appellant after taking note of the exclusion from service tax levy applied for refund. The Ld. Assistant Commissioner disputed the said refund claim and issued Show Cause Notice dated 19.11.2019 wherein it was alleged that the said refund claim was barred by limitation of time under Section 11B of the Central Excise Act, 1944, as made applicable for service tax refund. The Appellant submitted that the question of limitation would not apply in their case since the tax was paid under the mistake of law. However, the Ld. Assistant Commissioner rejected the refund claim by holding that the refund claim was clearly barred by limitation of time of one year as prescribed under Section 11B.

2.3 In the Appeal before Commissioner (Appeals), CGST, Guwahati, the said rejection of refund claim by the lower authority was upheld. Further apart from holding that the said refund claim was not admissible since filed beyond the time limit prescribed under Section 11B, the Commissioner (Appeals) also observed that the assessee failed to produce reliable evidence to support their claim of refund.

3. S/Shri G.Natarajan & Kartik Jindal, both Advocates appeared for the Appellant and Sri K.Chowdhury, Ld.Authorized Representative (A.R.) appeared for the Revenue.

4. The Ld.Advocate appearing for the Appellant relied on several judgements, including the decision of the Hon'ble Karnataka High Court in the case of K.V.R. Constructions vs. CCE, Bangalore[2010 (17) S.T.R. 6 (Kar)],to submit that when tax is legally not payable, the amount paid by the assessee would be considered to be 'deposit' which cannot be retained by the Revenue and that the period of limitation prescribed under Section 11B would not apply. The aforesaid decision rendered by

Hon'ble Single Bench has been further upheld by the Division Bench of Karnataka High Court reported as 2012 (26) S.T.R. 195 (Kar). The SLP filed by the Revenue against the said decision of the Hon'ble Karnataka High Court has been dismissed as reported in 2018 (14) G.S.T.L. J70 (S.C.).

5. The Ld. A.R. appearing for the Revenue reiterated the findings of the Ld. Commissioner (Appeals) and submitted that the refund claim has been rightly rejected since barred by limitation under Section 11B. He also relied on the decision in the case of ITC Limited vs. Commissioner 2019 (368) E.L.T. 216 (S.C.) to submit that having not challenged the assessment, the assessee is not entitled to claim refund. He accordingly prayed that the appeal of the assessee be rejected being devoid of any merit.

6. Heard both sides and perused the Appeal records.

7. I find that the only issue to be decided is whether the assessee would be entitled to refund for the claim filed by the assessee after the period of one year as prescribed under Section 11B of the Central Excise Act. It is not in dispute that assessee is not liable to pay service tax in respect of warehousing services which is categorically specified in the negative list of the services. I find that the Division Bench of the Hon'ble Karnataka High Court (Supra) has examined the provisions of Section 11B at length and has also considered the judgement of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. vs. Union of India 1997 (89) E.L.T. 247 (S.C.). The relevant portion of the judgement is reproduced herein 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…."

8. I find that the Hon'ble High Court of Bombay in the case of Parijat Construction Vs. Commissioner of Central Excise, Nashik [2018 (359) ELT 113 (Bom.)], had held that the limitation prescribed under 11B of the Central Excise Act, 1944, is not applicable to refund claim for service tax paid under mistake of law. The relevant paragraphs are reproduced below :

*"**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."*

9. In another judgement, the Hon'ble Madras High Court in the case of 3E Infotech Vs. CESTAT, Chennai [2018 (18) GSTL 410 (Mad.), held that the service tax paid under mistake of law – Refund admissible irrespective of period covered by refund application – Further, refusing to return the amount would go against the mandate of Article 265 of Constitution of India. The relevant paragraphs are reproduced below :

"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.*

10. *…….*

11. *…….*

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."

10. I find that the Hon'ble High Court of Telangana in the case of Vasudha Bommireddy Vs. Assistant Commissioner of Service Tax, Hyderabad [2020 (35) GSTL 52 (Telangana)], held that merely because payment made by petitioner, the same not to partake character of service tax and Department cannot retain amount. The relevant paragraph is reproduced below :

"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."

11. Further I find that the Division Bench of the Tribunal in the case of M/s Credible Engineering Construction Projects Limited Vs. Commissioner of Central Excise, Hyderabad- GST in Service Tax Appeal No.ST/30781/2018 vide Final Order No.A/30082/2022 dated 05.09.2022, has held as under :

"The Division Bench had agreed on the point of eligibility of the exemption under Notification no. 25/2012-ST, as regards the appellant. However, there was a difference of opinion with regard to the application of limitation under Section 11B, for the purpose of refund.

Para 46 of the Division Bench order was as follows:

"46. In view of the difference of opinion, the following questions arise for consideration by learned 3rd Member:

(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 J17.

OR

Limitation prescribed under section11B 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."

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 assesse shall be allowed grant of refund along with interest, as per rules. Appeal allowed. Impugned order is set aside."

12. I find that in similar circumstances, the Hon'ble Calcutta High Court in the case of Parimal Ray v. Commissioner of Customs (Port) [2015 (318) ELT 379 (Cal.)] had held that the provisions of the statute would apply only when duty was leviable under such statute. Accordingly, when the money has been paid by mistake, the person in receipt of such money becomes at common law a trustee with an obligation to repay the sum received. It was further held that when a wrong is continuing, there is no limitation for instituting a suit complaining about it. Therefore, even in the present case, the amount paid by the Appellant was not tax and was never leviable under the provisions of the Finance Act, 1994 or the Central Excise Act, 1944 and accordingly, the period of limitation provided therein would not apply.

13. I find that in another judgment passed by the Hon'ble Calcutta High Court in the case of East Anglia Plastics (I) Ltd. v. Assistant Collector of Customs [1990 (50) ELT 508 (Cal.)], the Hon'ble High Court

had held that when tax is collected without authority of Law, i.e. when such tax was not payable or leviable, the Revenue cannot retain the amount so collected under the garb of limitation, as the Revenue has acted without jurisdiction in collecting such amount paid by the assessee.

14. Further, I find that the Hon'ble Supreme Court in the case of Salonah Tea Company Ltd. Etc. v. Superintendent of Taxes, Nowgong & Ors. [1988 (33) ELT 249 (SC)] had held that if there is no provision for realisation of the money under a statute, then the act of payment is ultra vires and such money, if paid, is not paid under such statute and accordingly, the provisions under such statute would not apply. We find that even in the present case, the amount so paid by the Appellant was not payable during the relevant period.

15. Further, I find that the Hon'ble Supreme Court in the case of Shri Vallabh Glass Works Ltd. & Anr. v. Union of India & Ors. [1984 (16) ELT 171 (SC)] had held that just as an assessee cannot be permitted to evade payment of rightful tax, the authority which recovers tax without any authority of law, cannot be permitted to retain the amount, merely because the tax payer was not aware at that time that the recovery was being made without any authority of Law.

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.

18. Since the issue already stands decided, there is no reason to deny the refund claim on the ground of limitation inasmuch as the period of limitation prescribed under Section 11B would not be a bar for the assessee to claim refund of tax paid under mistake. In so far as the decision of the Apex Court in the case of ITC Ltd (Supra) relied by the Revenue is concerned at this stage of second appeal, I find that that the same has no relevance in the present appeal since the same was not the subject matter of the Show Cause Notice nor was ever raised before the Commissioner (Appeal). Moreover, the above decision is distinguishable on the facts of the present case.

19. It is observed that the Ld. Commissioner (Appeals) has disputed the claim of refund on the ground that the appellant failed to produce reliable evidence to support the refund claim. In this regard, I find that no dispute was ever raised in the Show Cause Notice as well as in the Order-in-Original with regard to the documentary evidence for payment of service tax by the assessee. Therefore, the finding made by the Ld. Commissioner (Appeals) has clearly travelled beyond the scope of allegations in the Show Cause Notice since not in dispute. Therefore, the said observation of the Commissioner (Appeals) cannot be legally sustained.

20. In view of the findings made above, the impugned orders are set aside and the appeal is allowed with consequential relief as per law.

(Pronounced in the open court on **16.09.2022**)

Sd/
(P. K. Choudhary)
Member (Judicial)

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