(2021) 09 CESTAT CK 0019

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 672 Of 2009

C.C.E. And S.T.-Mangalore APPELLANT

Vs

New Mangalore Port Trust RESPONDENT

Date of Decision : 23-09-2021

Acts Referred:

Central Excise Act, 1944 — Section 11A, 11B
Service Tax Rules, 1994 — Rule 6, 9B

Citation : (2021) 09 CESTAT CK 0019

Hon'ble Judges : P. Dinesha, J;Raju, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. This appeal has been filed by Commissioner of Central Excise, Mangalore against the order of Commissioner(Appeals) allowing appeal of M/s. New Mangalore Port Trust, Panambur.

2.1. The respondent had filed refund claim for the period April 2005 to March 2006 in respect of service tax paid by them on wharfage charges. The respondents were providing services to MRPL and in terms of Memorandum of Understanding (MOU) dt. 20.01.1995 and dt. 09.02.2000, the cost of providing infrastructural facilities by the respondents was to be funded by MRPL on interest bearing loan basis by investing a portion of the amount out of its own funds and arranging the balance amount from the financial institutions. The terms of the MOU provided for the following:-

During the period the funds are outstanding, and in order to enable NMPT to repay the funds along with interest thereon in accordance with the repayment schedules under the respective agreements, the wharfage charges payable by MRPL to NMPT will be based on (a) actual operation and maintenance cost, (b) sharing of administrative and general overheads, (c) depreciation, (d) interest on loan, and (e) some percentage of capital employed to be fixed by the Government. The wharfage charges will be subject to yearly review and consequent adjustment depending on the tonnage involved.

Similar treatment was given to the other major clients like HPCL, IOCL and BPCL.

2.2. In order to service the loan and to meet the operational expenses the respondent port collects wharfage from MRPL and other oil companies. The wharfage rate is fixed at an adhoc rate based on projected traffic and projected expenditure. The tonnage handled during a financial year is booked at this adhoc rate and a bill is raised on the oil companies at the time when the import application or the export application is filed by the oil companies. Service tax is charged and collected upfront at the time of raising the bill. The respondent claimed that the service tax paid by the oil companies is under protest and is provisional, which they claimed is evidenced in the import/export application. The import/export application had following remark:-

"Service tax paid under protest. The payment of service tax is on provisional basis subject to final adjustment at year end when charges are finalised and billed to us by NMPT and excess service tax aid by us is any has to be refunded to us."

2.3. The service tax collected each month on these adhoc rate transactions is credited to an account called "Service Tax Collected Account" (Account Code No.633). The remittance of service tax is debited to the said account within 5th of the subsequent month or on payment. All such payments have been reflected in the half yearly returns filed by the respondent along with the TR6 challans.

2.4. After arriving at the wharfage charges per MT in accordance with the MOU, the same is compared with the adhoc rate and the difference is adjusted. That is to say, if the charges worked out as per MOU is less than the adhoc rate, the difference is reduced from the concerned income head (income component) and shown as payable to MRPL or other oil companies like BPCL, IOCL etc. as the case may be in the balance sheet. Similarly, excess service tax collected and already remitted along with the ST-3 returns is also shown as payable to the oil companies. For the relevant year i.e. 2005-2006, the adhoc rate was mutually agreed to be Rs.49 per MT. The respondents calculated the charges based on this adhoc rate and charged service tax on the amount so arrived at and deposited the same. In February 2006, adhoc rates were reworked to Rs.38 per MT. The excess wharfage collected from April 2005 to February 2006 (on account of this reduction) along with service tax component on the same was worked out and refunded by the respondent to the respective oil companies by way of cheques in February 2006 itself. Since the respondent was not sure of the exact amount of service tax that it was required to pay for the period 2005-06 and in order to ensure that there is no short payment made by it, a payment of Rs.20 lakhs and Rs.40 lakhs was made for the months of March 2006 on its own account vide TR-6 challans dt. 01.04.2006, 05.04.2006 and 12.04.206. Thereafter, by the end of the year when the books for the year 2005-06 were closed in June 2006, the final wharfage rate after taking the actual expenses incurred by the respondent was arrived at Rs.30.03 PMT. On an overall reconciliation, the respondent found that as a result of further revision of wharfage from Rs.38 PMT to 30.03 PMT, an excess payment of service tax amounting to Rs.1,52,54,149/- has been collected from oil companies and also remitted to the government during the year 2005-06. The sum of Rs.60 lakhs paid by the respondent by way of abundant caution was claimed to be excess service tax paid. The respondent accordingly filed claim on 22.03.2007 for a total sum of Rs.2,12,54,149/-. The refund claim filed was rejected by the Order-in-Original dt. 20.12.2007. The amount of 1,52,54,149 was rejected on the ground that the same was filed beyond the limitation prescribed under Section 11B of the Central Excise Act, 1944. It was also held that the respondent had not complied with the procedurals prescribed under Rule 6 of the Service Tax Rules, 1994 for opting provisional assessment. Therefore the instant case was not that of provisional assessment. The amount of Rs.60 lakhs was rejected on the ground that the respondents were required to pay service tax of Rs.2,08,32,876/- during the period February 2006 and March 2006 and the respondent had paid only Rs.60 lakhs and therefore there was shortfall of payment of Rs.2,08,32,876/-and therefore there was no question of any refund. The respondents filed appeal before the Commissioner(Appeals) who in his order held that in respect of the refund of Rs.1,52,54,149/- which was rejected on ground of limitation, should not have been rejected as the assessment ought to have been considered as provisional. He relied upon various decisions of the Tribunal for this purpose. He also observed that the service recipients might have taken cenvat credit which has to be reversed if the amount excess paid service tax is granted as refund and therefore the exercise would be revenue neutral. In respect of refund of balance of Rs.60 lakhs paid for the period February 2006 and March 2006, he held that the Order-in-Original could not have gone into issue of admissibility of refund as the show-cause notice raised only the ground of unjust enrichment. He held that the original authority has rejected the refund on grounds which were not invoked in the show-cause notice and therefore the order was held as bad in law. Further, for the purpose of unjust enrichment, the issue was remanded to the original adjudicating authority by the Commissioner (Appeals).

3.1. Learned AR relying on the grounds of appeal raised in the appeal memorandum, pointed out that the remark regarding payment of service tax under protest was made in the "import/export applications" which is an internal document between the respondent and oil companies and not an intimation to the Department. She pointed out that there was no mention of payment under protest on the TR6 challan. She also pointed out that the appellant had not followed the procedure prescribed under Rule 6 of the Service Tax Rules nor they have filed returns under ST-3A. She pointed out that in view of the above, the assessment cannot be considered as provisional and therefore the refund was clearly barred by limitation. She also relied on the decision of Hon'ble Punjab & Haryana High Court in the case of Mauria Udyog Ltd. Vs. CCE [2007(207) ELT 31 (P&H)] which was upheld by Hon'ble Apex Court as reported in 2008(221) ELT

A120(SC). She also relied on the decision of the Hon'ble High Court of Bombay in the case of Maharastra Cylinders Pvt. Ltd. Vs. CESTAT, Mumbai [2010(259) ELT 369 (Bom.)].

3.2. She further pointed out that a corrigendum to the show-cause notice dt. 29/08/2007 was also issued by which a specific charge regarding inadmissibility of refund of Rs.60 lakhs was also raised against the appellant. She argued that the same corrigendum has not been considered by the Commissioner (Appeals) in his order.

4. Learned counsel for the respondent pointed out that all the import and export applications specifically contain a remark that duty has been paid under protest and therefore the assessment should be considered as provisional. He relied on the following decisions of Tribunal:-

i. CCE, Tirupati Vs. Kurool Cylinders Pvt. Ltd. [2007(219) ELT 473 (Tri. Bang.)]

ii. Telephone Cables Ltd. Vs. CCE, Chandigarh [2003(154) ELT 237 (Tri. Del.)]

iii. Keltech Energies Ltd. Vs. CCE, Mangalore [2006(196) ELT 282 (Tri. Bang.)]

iv. PTC Industries Ltd. Vs. CCE, Jaipur-I [2016(340) ELT 563 (Tri. Del.)]

He argued that in the aforesaid decisions, it was held that where the price is not final at the time of provision of services or supply of goods, the assessment should be deemed as provisional.

5.1. We have considered the rival submissions. We find that the issue that needs to be decided is in respect of two separate amounts. The amount of Rs.1,52,54,149/- relates to denial of refund by original adjudicating authority on the ground of limitation. The same was allowed by the Commissioner (Appeals) holding that the assessment should have been considered as provisional as there was a price determination clause in the MOU between the service provider and the service recipients. There is no doubt that the price between the service provider and the service recipient was not finally determined at the time of provision of service. Therefore on account of revision of price, the assessable value was required to be reworked and consequently there was a case of the respondent where they ended up paying duty more than that was required to be paid. The refund of any excess duty paid by any person is determined under Section 11B of the Central Excise Act. Section 11B prescribes a period of limitation of one year, however the said period of limitation is not applicable if the assessment is provisional. In the instant case, the claim of the respondent is that the assessment should have been deemed to be provisional as the final price was not determined at the time of provision of service and they had specially indicated in export/import applications that the service tax was paid under protest. The learned counsel for the respondent relied on the following decisions of the Tribunal.

i. CCE, Tirupati Vs. Kurool Cylinders Pvt. Ltd. [2007(219) ELT 473 (Tri. Bang.)]

ii. Telephone Cables Ltd. Vs. CCE, Chandigarh [2003(154) ELT 237 (Tri. Del.)]

iii. Keltech Energies Ltd. Vs. CCE, Mangalore [2006(196) ELT 282 (Tri. Bang.)]

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5.2. Learned AR for the appellant has relied on the decision of the Hon'ble High Court of Punjab & Haryana wherein, the following has been observed:-

6. Learned Counsel for the revenue on the other hand points out that apart from the fact that the matter was directly covered against the assessee by a judgment of Hon'ble Supreme Court in MRF's case (supra), there is a subsequent judgment of the Hon'ble Supreme Court in Metal Forgings v. Union of India, 2002 (146) E.L.T. 241 in which it was held :-

"12. From the above, it is clear that to establish that the clearance were made on a provisional basis, there should be first of all an order under Rule 9B of the Rules, and then material to show that the goods were cleared on the basis of said provisional basis, and payment of duty was also made on the basis of said provisional classification. These facts in the instant case are missing, therefore, in our opinion there is no material in the instant case to establish the fact that either there was a provisional classification or there was an order made under Rule 9B empowering the clearance on the basis of such provisional classification. In the absence of the same, we cannot accept the argument of the Revenue that in fact the order of the Assistant Collector dated 21-1-1976 is a provisional order based on which clearance was made by the appellants or that they paid duty on that basis. On the contrary, as held by the Judicial Member the said order of classification was a final order, therefore, the Revenue cannot contend the limitation prescribed under Section 11A does not apply."

The said decision was upheld by Hon'ble Apex Court as reported in 2008(221) ELT A120(SC). Learned AR has also relied upon the decision of Hon'ble High Court of Bombay in the case of Maharastra Cylinders Pvt. Ltd. wherein in para 7, the following has been observed:-

7. We do not find any merit in the above contentions. Admittedly, while clearing the goods on payment of excise duty, the procedure for removal of goods on provisional basis has not been followed. The Apex Court in the case of Metal Forgings v. Union of India [2002 (146) E.L.T. 241 (S.C.)] has held that in the absence of order of provisional assessment, the clearance cannot be said to be on provisional assessment basis.

5.3. We also find that in the case of Metal Forgings Vs. UOI [2002(146) ELT 241 (SC)], the Hon'ble Apex Court has observed as follows:-

11. The next question for our consideration is whether the order made by the Assistant Collector on 22-1-1976 could be treated as a provisional classification so as to keep the period of limitation frozen. The Judicial Member in this regard came to a definite conclusion that the said order is a final order against which

appeals and revisions were taken recourse to. According to the learned Member merely because there is a continuing dispute in regard to the correctness of the said order of the Assistant Collector by way of appeals and revisions, the same does not make the order of the Assistant Collector anything short of a final order, therefore, he rejected the contention of the Revenue on this count. While the Technical Member and the third Member following the judgment of this Court in the case of Samrat International (supra) came to the conclusion that the order of the Assistant Collector could be treated as a provisional order because there was correspondence regarding the excisability and the classification list filed by the appellants. From the above we notice that the majority of the members of the Tribunal based their finding that the clearances made by the appellants during the relevant period was provisional in nature mainly because of the finding of this Court in the case of Samrat International (supra). A perusal of this judgment shows that the said judgment was delivered on the peculiar facts of that case and it does lay down a principle in law which enables the Revenue to treat every classification made by it or the goods removed by virtue of said classification to be treated as the provisional merely because some appeal or other proceeding is pending, questioning the classification involved therein. As a matter of fact, this Court in the case of Coastal Gases & Chemicals Pvt. Ltd. v. Asstt. C.C.E., Visakhapatnam (supra) while considering the judgment in Samrat International case (supra) held thus :

"On the facts of that case, however, this Court had held that the payment of duty which was made by the appellants in that case was provisional and the procedure under Rule 9B had been followed. We have not been shown any material on record to indicate whether the appellants in the present case had cleared carbon dioxide manufactured by them by following the procedure laid down in Rule 9B or that the payment of excise duty which the appellants had made during the relevant period was provisional."

12. From the above, it is clear that to establish that the clearances were made on a provisional basis, there should be first of all an order under Rule 9B of the Rules, and then material to show that the goods were cleared on the basis of said provisional basis, and payment of duty was also made on the basis of said provisional classification. These facts in the instant case are missing, therefore, in our opinion there is no material in the instant case to establish the fact that either there was a provisional classification or there was an order made under Rule 9B empowering the clearance on the basis of such provisional classification. In the absence of the same, we cannot accept the argument of the Revenue that in fact the order of the Assistant Collector dated 21-1-1976 is a provisional order based on which clearance was made by the appellants or that they paid duty on that basis. On the contrary, as held by the Judicial Member the said order of classification was a final order, therefore, the Revenue cannot contend the limitation prescribed under Section 11A does not apply.

In view of clear observation by Hon'ble Apex Court and various High Courts, we find that the assessment cannot automatically turn provisional in absence following due procedures as prescribed under Rule 6 of Service Tax Rules. Since the assessment cannot be termed provisional in the instant case, the refund of Rs.1,52,54,149/- claimed by the respondent is clearly barred by limitation. The case law relied by respondents does not take note of the decision of Hon'ble Apex Court in the case of Metal Forgings (supra). The order of Commissioner (Appeals) in respect of the said amount is therefore set aside.

5.4. As regards the refund of Rs.60 lakhs claimed by the respondent, it is noticed that the Order-in-Original points out in para 62 that the total amount recovered by the appellant at the material time was much higher than that paid by the respondent. In this regard, para 62 of the Order-in-Original is reproduced below:-

62. In respect of remaining amount of refund claim of Rs.60,00,000/-, for which the documentary evidence submitted by the claimant vide their letter No.NMPT/ FIN/S.T/2005-06 dt. 04.10.07 along with the statement of taxable value collected along with service tax shown in their account code No.633 in the month of February 2006 and March 2006 as detailed below:-

Month

Taxable value collected

Service tax collected

Taxable value declared as per ST3

Service Tax paid as per ST3

Differential taxable value

Differential service tax

February 2006

18,51,97,449

1,90,08,841

33,49,539

3,41,653

18,48,55,796

1,88,55,291

March 2006

24,62,42,720

2,47,44,997

22,68,54,627

2,31,39,172

1,93,88,093

19,77,585

Total

43,14,40,169

4,37,53,838

23,02,04,166

2,34,80,825

20,42,43,889

2,08,32,876

5.5. Moreover, it is seen that the issue regarding short payment of duty was also raised by corrigendum dt. 29/08/2007 issued by the Assistant Commissioner. As a result, it cannot be said that the show-cause notice did not raise any ground other than unjust enrichment. It is seen that the Order-in-Appeal did not examine the issue regarding the short payment of service tax during the month of February and March 2006 and has ignored the corrigendum to the show cause notice issued by the jurisdictional Assistant Commissioner. As a result, the order of Commissioner (Appeals) is set aside on this count as well and the matter is remanded to the Commissioner(Appeals) for fresh adjudication after examining the corrigendum issued to the show-cause notice.

6. In view of the above, the order of Commissioner (Appeals) is set aside in respect of the refund claim of Rs.1,52,54,149/-. The order of Commissioner (Appeals) is set aside in respect of the refund claim pertaining to Rs.60 lakhs and the matter is remanded back to the Commissioner(Appeals) for examining the issue afresh and pass orders.

(Order was pronounced in Open Court on 23/09/2021)