(2024) 06 CESTAT CK 1549

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Service Tax Appeal No. 51284 of 2017

Haji Abdul Majeed & Sons — APPELLANT

Vs

Commissioner of Central Excise — RESPONDENT

Date of Decision : 27-06-2024

Acts Referred:
Central Excise Act, 1944 — Section 11B, 2(15)
Finance Act, 1994 — Section 65(95), 83, Chapter V

Citation : (2024) 06 CESTAT CK 1549

Hon'ble Judges : Dilip Gupta, President (J);Hemambika R. Priya, Member (T)

Bench : Division Bench

Advocate : Om Prakash Agarwal, S.K. Meena

Final Decision : Allowed

Judgement

Dilip Gupta, J

1. M/s Haji Abdul Majeed & Sons, the appellant has filed this appeal to assail the order dated 19.04.2017 passed by the Commissioner (Appeals) by which the appeal filed by the appellant for setting aside the order dated 29.09.2014 passed by the Assistant Commissioner has been dismissed.

2. The appellant claims that since it had inter alia constructed residential houses for the residence of staff of Rajasthan Rajya Vidyut Prasaran Nigam Limited, Rajasthan Vidyut Nigam, service tax could not have been levied. The appellant also claims that the houses constructed by the appellant are individual and independent houses and are not part of any building or buildings having more than one residential unit. For this purpose, the appellant has placed reliance upon a certificate dated 12.08.2014 issued by the Executive Engineer of the Rajasthan Vidyut Nigam which certifies that not only there is a single residential unit, but also that the houses are for the residence of the employees of Rajasthan Vidyut Nigam.

3. It is also stated by the appellant that though service tax was not leviable, but

still Rajasthan Vidyut Nigam deducted service tax at the rate of 2.47% from the bills submitted by the appellant under the reverse charge mechanism. The appellant, accordingly, filed a refund claim of Rs. 60,290/- on 30.06.2014.

4. However, a show cause notice dated 23.09.2014 was issued to the appellant alleging that the appellant was not the proper person for claiming refund as service tax was deposited by the Rajasthan Vidyut Nigam. The show cause notice also alleged that the person claiming refund has to make an application to the adjudicating authority before the expiry of one year from the "relevant date" which, in the present case, would be the date on which service tax was initially paid but the application was not submitted within the said period.

5. The appellant filed a reply to the show cause notice, but the Assistant Commissioner rejected the refund claim of the appellant for the reason that the claim was filed after one year period prescribed under section 11B of the Central Excise Act, 1944, the Central Excise Act. Certain other grounds were also indicated by the Assistant Commissioner in the order.

6. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals), after noting that the houses were constructed for the employees of Rajasthan Vidyut Nigam, rejected the contention of the appellant that service tax would not be leviable as the services provided by the appellant would clearly fall under the category of "works contract". The Commissioner (Appeals) also rejected the refund claim for the reason that it was filed beyond the one year period contemplated under section 11B of the Central Excise Act.

7. Shri Om Prakash Agarwal, learned Chartered Accountant for the appellant submitted that in view of the decision of the Tribunal in Ample Construction Company vs Commissioner of Central Excise & Service Tax, (2024) 17 Centax 110 (Tri.-Ahmd), service tax could not have been levied on the construction of houses by the appellant for the residence of the employees of Rajasthan Vidyut Nigam. Learned Chartered Accountant also submitted that in view of the decision of a Division Bench of this Tribunal in S.P. Builders vs. Commissioner of Central Excise, Jaipur-II, Service Tax Appeal No. 50485 of 2017 decided 22.02.2023, the limitation contemplated under Section 11B of the Central Excise Act would not be applicable since the amount had been paid under a mistaken notion.

8. Shri S.K. Meena, learned authorized representative appearing for the department, however, supported the impugned order and submitted that it does not call for any interference.

9. The submissions advanced by the learned Chartered Accountant for the appellant and the learned authorized representative appearing for the appellant have been considered.

10. The first issue that arises for consideration is as to whether service tax could have been levied on the construction of houses by the appellant for the residence

of the employees of Rajasthan Vidyut Nigam. This issue was examined by a Division Bench of the Tribunal in Ample Construction Company and it was held in relation to the construction of houses for use by the staff of Gujarat State Police Housing Corporation that they could not be subjected to levy of service tax. Thus, in view of the aforesaid decision of the Tribunal, service tax could not have been levied on the construction of houses for the residence of the employees of Rajasthan Vidyut Nigam.

11. The second issue that arises for consideration is whether the limitation of one year contemplated under section 11B of the Central Excise Act would be applicable in the facts of the present case. The contention of the appellant is that service tax was paid by it under a mistaken notion and, therefore, refund can be claimed and the bar of one year limitation would not apply. To support this contention, the learned Chartered Accountant for the appellant has placed reliance on the decision of the Tribunal in SP Builders.

12. The said decision of the Tribunal in SP Builders does support the contention advanced by the learned Chartered Accountant. It is also seen that the Division Bench had placed reliance upon the decision of the Tribunal in Credible Engineering Construction Projects Limited vs Commissioner of Customs & Central Excise (Appeals), Hyderabad, Service Tax Appeal No. 30781 of 2018 decided on 08.02.2022. In Credible Engineering Construction, after placing reliance upon the decisions of the Delhi High Court in Hind Agro Industries Limited vs. Commissioner of Customs, 2008 (221) ELT 336 (Del.); Alar Infrastructure Pvt. Ltd vs. Commissioner of Central Excise, Delhi-I, 2015 (40) STR 1066 (Del.), and the decision of the Karnataka High Court in Commissioner of Central Excise (Appeals), Bangalore vs. KVR Construction, 2012 (26) STR 195 (Kar.), and the decision of the Telangana High Court in Vasudha Bommireddy vs. Assistant Commissioner of Service Tax, Hyderabad, 2020 (35) GSTL 52 (Telangana), and the decision of the Bombay High Court in Parijat Construction vs. Commissioner of Central Excise, Nashik, 2018 (359) E.L.T. 113 (Bom.) the following observations were made :

“28. The position that would emerge from the aforesaid decisions is:

(i) Section 11B of the Excise Act deals with claim for refund of any duty and duty has been defined under section 2(15) of the Excise Act to mean a duty of customs leviable under the Excise Act. Section 65(95) of the Finance Act defines “service tax” to mean a tax leviable under the provisions of Chapter V of the Finance Act. Thus, section 11B of the Excise Act would apply to refund of excise duty leviable under the provisions of the Excise Act and likewise, in service tax matters, it would apply only if the refund is sought of service tax leviable under Chapter V of Finance Act;

(ii) The decision of the Supreme Court in Mafatlal Industries Ltd. is in connection with refund of duty payable within the meaning of either the Central Excises and Salt Act, 1944 or the Customs Act, 1962, as the case may be. It would, therefore, not apply when payments are erroneously made. The Delhi High Court in Hind Agro Industries, for this reason, held that the decision of the Supreme Court Mafatlal Industries Ltd. would not apply to refunds of amount made under a mistaken notion and in this connection the Delhi High Court placed reliance upon the decisions of the Supreme Court in Salona Tea Company Ltd. and U.P. Pollution Control Board;

(iii) The decision of the Delhi High Court in Hind Agro Industries was followed by the Karnataka High Court in KVR Construction and the jurisdictional Telangana High Court in Vasudha Bommireddy;

(iv) Therefore, refund of an amount deposited under a mistaken notion cannot be denied for the reason that application was filed beyond the time prescribed in section 11B of the Excise Act; and

(v) If payment of service tax is exempted under a notification, the Department cannot demand the said amount if it was not deposited. In other words, the Department lacked the authority to levy and collect such service tax. Conversely payment of such an amount would not authorize the Department to regularize such payment.”

13. The contention of the learned authorized representative appearing for the department that the limitation provided in section 11B of the Central Excise Act would also be applicable to cases where any amount has been paid under a mistaken belief, in view of the decision of the Supreme Court in Mafatlal Industries Ltd. vs. Union of India, 1997 (89) ELT 247, was not accepted for the following reasons:

“30. The said judgment of the Supreme Court in Mafatlal Industries Ltd. has been explained by the Delhi High Court in Hind Agro Industries to not apply to cases where any amount is deposited under a mistaken belief and in fact reliance was placed by the Delhi High Court on two judgments of the Supreme Court rendered in Salona Tea Company Ltd. and M/s Kanodia Industrial Limited to support the view taken by the Delhi High Court. Mafatlal Industries has also been considered by the Karnataka High Court in KVR Construction, which judgment was followed by the jurisdictional Telangana High Court in Vasudha Bommireddy. It is, therefore, not possible to accept the contention of the learned authorized representative appearing for the Department.”

14. The decision of the Tribunal in Credible Engineering Construction was assailed by the department before the Telengana High Court in Commissioner of Customs and Central Excise vs Credible Engineering Construction Projects Limited, Central Excise Appeal No. 03 of 2023 decided on 15.04.2024. This appeal was dismissed and the relevant portion of the judgment is reproduced below:

“7. Mr. Dominic Fernandes, learned counsel for the appellant fairly submits that he is proposing only one substantial question of law i.e., "whether, while processing/considering a claim for refund, the limitation contemplated under

Section 11B of the Excise Act, made applicable to service tax under Section 83 of the Finance Act, 1994 would be applicable or inapplicable, in a case where any amount even though it is not payable as service tax, is voluntarily paid by the assessee?"

8. To elaborate, he placed reliance on the judgment of the Hon'ble Supreme Court in Mafatlal Industries Ltd. v Union of India. He submits that in the light of this judgment, the Tribunal has committed an error of law which has given rise to the aforesaid substantial question of law. The other side raised objection.

9. We have heard the matter at length. It is seen that the single question raised by Mr. Dominic Fernandes, learned counsel is no more res integra. In the manner proposed question is framed, it is not in dispute that service tax was not payable by the assessee. This question came up for consideration before the Delhi High Court in Hind Agro Industries Limited v. Commissioner of Customs. After considering the judgment of the Hon'ble Supreme Court in case of Mafatlal Industries Ltd. (supra 1), the Delhi High Court held that the judgment of Mafatlal Industries Ltd. (supra 1) nowhere talks of a situation where the refund of a tax paid under the relevant Act albeit erroneously was required to be made under the Excise Act or the Customs Act and under no other enactment. It was clearly held that judgment of Mafatlal Industries Ltd. (supra 1) is of no assistance in a case where tax is erroneously paid as a mistake of law.

10. The Tribunal has also taken note of the judgment of Karnataka High Court in Commr. of C.Ex. (Appeals), Bangalore v. KVR Construction. The Karnataka High Court also considered the judgment of Delhi High Court in case of Hind Agro Industries Limited (supra 2) and the judgment of Mafatlal Industries Ltd. (supra 1) and in no certain terms made it clear that where the tax is admittedly paid as a mistake of law, the limitation will not come in the way for refund.

11. It is pointed out by both sides that the judgment of Karnataka High Court in case of KVR Construction's (supra 3) was unsuccessfully challenged before the Hon'ble Supreme Court and SLP was dismissed on 11.07.2011 which is taken note of by the Tribunal.

12. The judgment of this Court in Vasudha Bommireddy v. Assistant Commissioner of S.T. was relied upon by other side by contending that the judgment of Karnataka High Court in KVR Construction (supra 3) was considered and this Court also held that when a tax is paid as a mistake of law, the embargo of limitation will not come in the way of claim of refund.

13. We have gone through the aforesaid judgments of the Delhi, Karnataka and the judgment of this Court in case of Vasudha Bommireddy (supra 4). The common string in all the above judgments is that if the contractor was not liable to pay tax, the department cannot retain the amount paid and in that view of the matter, bar of limitation under Section 11B of the Act, 1944 cannot be pressed into service.

14. In this view of the matter, in our opinion, no substantial question of law subsists and needs to be answered, because curtains are already drawn on this issue by various High Courts. Thus, admission is declined.

15. Accordingly, the Central Excise Appeal is dismissed. No costs."

15. In view of the aforesaid discussion, the limitation of one year period contemplated under section 11B of the Central Excise Act would not be applicable where service tax has been paid under a mistaken notion.

16. Thus, for all the reasons stated above, the order dated 19.04.2017 passed by the Commissioner (Appeals) cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Dictated & pronounced in the Open Court)