

(2022) 01 CESTAT CK 0023

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 51834 Of 2018

**M/s Ishwar Metal Industries Vs Commissioner, Central Excise And
Central Goods And Service Tax??**

Date of Decision : 28-01-2022

Acts Referred:

Central Excise Act, 1944 — Section 11B

Citation : (2022) 01 CESTAT CK 0023

Hon'ble Judges : Anil Choudhary, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. The issue involved in this appeal is whether the Commissioner (Appeals) has rightly rejected the refund claim.

2. Heard the parties.

3. Brief facts of the case are that the appellant has provided the following services during the period 2007 – 08 to 2009 – 10:-

(i) Shifting of overhead cables/wires for the reason such as widening/renovation of roads.

(ii) Laying of cables under or alongside road.

(iii) Laying of electrical cables between grids/sub-stations /transformer station, en-route

(iv) Installation of street lights, traffic lights, or other electrical and electronic appliances/devices or providing electric connection to them etc.

4. The appellant is registered with the Service Tax Department. The appellant filed refund claim for Rs. 31,50,587/- on 25.05.2011. It is submitted by the appellants that as per Board's Circular No. 123/5/2010 -TRU dt.24.05.2010, the work undertaken by them for Electricity Board/Nigam, as aforementioned, are not liable to service tax, hence no service tax was payable. The amount

mistakenly paid was thus a deposit and not service tax, which is refundable to them alongwith interest u/s 11B. The appellant claimed refund of such amount i.e. Rs.31,50,587/-, paid during the period 2007-08 to 2009-10. They submitted that limitation u/s 11B is not applicable in this case, as the amount was paid mistakenly which was not payable. They relied upon the ruling in 3 E Infotech vs. CESTAT Chennai [2018 (18) GSTL 410 (Mad.)] and Venkatraman Guha Prasad vs. Commissioner of CGST, Chennai [2020 (42) GSTL 124 (TRI-Chennai)], where under similar facts and circumstances, it was held that limitation under Section 11B is not applicable.

5. The appellants further submitted that unjust enrichment is also not applicable in the present case. They did not recover the service tax amount from the service recipient. The prices were firm. There is no dispute that all the services/work was allotted by the government was through open bidding. The appellants procured the work order in competition, and as per clause of the contract, the government department did not pay any tax, but it was borne by the appellant. The price fixed as per work order is not affected due to levy of tax. As per the clause of price, it is clearly mentioned that the price is as per open bid. The prices are firm in all respect and independent of any variation. The appellants also did not collect any service tax from the service recipient. Hence, question of unjust enrichment does not arise.

6. The claim of refund was rejected by the Assistant Commissioner observing that the appellant were registered with the Department and was aware that they are required to deposit service tax on the taxable services. The appellant have issued invoices/bill inclusive of service tax in respect of services rendered by them. Out of such payment received they have deposited the service tax portion in the government exchequer. The appellant was aware of the liability and also declared the same in their ST 3 returns filed with the Department. Therefore the amount deposited is tax amount and not just any amount deposited. It was further held that the amount collected by the appellant for the specific service rendered is cum tax amount.

7. Further, admittedly, the claim has been filed after more than one year from the date of deposit of the tax.

8. Being aggrieved the appellant preferred appeal before the Id. Commissioner appeals, who vide impugned order in appeal dismissed the appeal agreeing with the findings of the Assistant Commissioner.

9. Learned Authorised Representative for Revenue relies on the impugned order and prays for rejecting the appeal.

10. Having considered the rival contentions, I find that service tax was not leviable on the services provided by the appellants, which was paid by mistake by the appellants, thus, it will be treated as deposit, ipso facto, and are entitled for refund.

11. This fact is more evident as the services provided by the appellants are - route survey, design, supply of material for construction, erection and commissioning of 33KV D/C Line on Panther Conductor for 2.5 km from 132 KV GSS, Equipment for the work of urban focus programme, equipment for providing HVD/LVD system, etc.

12. Further Limitation u/s 11B will not be applicable as the amount deposited is not tax and, at best, revenue deposit. My view is fortified in view of the judgements passed by Madras High Court in its ruling in 3 E Infotech (supra).

13. As far as applicability of unjust enrichment, in view of the work orders, which were issued to the appellants in competitive open bid, as per contract it is clear that the prices are Firm in all respect and Independent of any variation. It is also not in dispute that the appellants have not charged any service tax in their invoices. I am of the view that unjust enrichment is also not applicable.

14. Accordingly, the appeal is allowed and the impugned order is set aside. The adjudicating authority is directed to grant refund of the said amount in cash, as required under the Transitional Provisions of CGST Act within 45 days from the receipt of this order and is further directed to pay interest @12% p.a. from end of three months from the date of refund application by the appellant, till the date of grant of refund.

15. Thus, the appeal is allowed.

(Pronounced on 28.01.2022).