
(2021) 06 CESTAT CK 0027

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 40147 Of 2020

M/s. Nilkamal Limited

APPELLANT

Vs

Commissioner Of G.S.T. And Central Excise

RESPONDENT

Date of Decision : 23-06-2021

Acts Referred:

Finance Act, 1994 — Section 64, 66B, 67, 94
Central Goods and Services Tax Act, 2017 — Section 142, 142(1), 142(5)
Central Excise Act, 1944 — Section 11B(2)
Cenvat Credit Rules, 2004 — Rule 2(1)
Constitution Of India, 1950 — Article 265

Citation : (2021) 06 CESTAT CK 0027

Hon'ble Judges : P. Dinesha, J

Bench : Single Bench

Advocate : Sachin Chitnis, Arul C. Durairaj

Final Decision : Allowed

Judgement

1. By this appeal, the appellant is seeking refund of the Service Tax and interest paid by it under Reverse Charge Mechanism on freight services

received from foreign shipping line during the period from April to June 2017.

2.1 Two Notifications, viz. Nos. 15/2017-ST and 16/2017-ST, both dated 13.04.2017, whereby it was required for an importer to pay Service Tax on

services by way of transportation of goods by a vessel from a place outside India up to the Custom station of clearance in India even in the case of

Cost, Insurance and Freight (CIF) contracts. The said levy under the above Notifications came to be challenged before the Honâ??ble High Court of

Gujarat in the case of M/s. Sal Steel Ltd. [2020-TIOL-163-HC-AHM-ST] wherein the Honâ??ble High Court struck down the same as ultra vires to

Sections 64, 66B, 67 and 94 of the Finance Act, 1994.

2.2 It is the case of the appellant that despite being struck down, the audit officers of the Revenue insisted for the payment of Service Tax along with interest whereby the appellant was compelled to pay the same vide Challan No.00039 dated 01.03.2019. Immediately thereafter, the appellants filed refund claim of the said amount claiming that the said payment was under mistake of law and that the levy itself was ultra vires, in response to which a Show Cause Notice dated 04.04.2019 was issued inter alia proposing to reject the appellant's refund claim on the ground that the same was neither covered by Section 142 of the CGST Act, 2017 nor relatable to Section 11B(2) of the Central Excise Act, 1944, as made applicable to Service Tax. The appellant offered a detailed reply, seriously contesting the denial.

3. However, vide Order-in-Original No. 13/2019 (Refund) dated 09.07.2019, the proposal in the Show Cause Notice came to be confirmed. Upon appeal, the rejection also came to be upheld by the First Appellate Authority vide impugned Order-in-Appeal No. 36/2019 (CTA-I) dated 05.12.2019.

Against this rejection, the present appeal has been filed before this forum.

4. When the matter was taken up for hearing, Shri Sachin Chitnis, Learned Advocate, appeared for the appellant and Shri Arul C. Durairaj, Learned Departmental Representative, appeared for the Revenue.

5. Heard both sides and have carefully gone through the documents placed on record.

6.1 At paragraph 4.3 of the Order-in-Original, the Adjudicating Authority refers to one of the arguments of the appellant that the Service Tax was not liable to be recovered from them on the ground of revenue neutrality, that all imports in relation to which the Service Tax was recovered during the course of audit were of inputs on which they had availed CENVAT Credit and that the Service Tax paid on such ocean freight amount was also admissible to them as CENVAT Credit. The appellant has also relied on a number of decisions in this regard.

6.2 Further, at paragraph 6 of the Order-in-Original, the Adjudicating Authority observes that after going through the replies of the appellant, the payment of Service Tax under Reverse Charge Mechanism is an eligible input service as per Rule 2 (I) of the CENVAT Credit Rules, 2004, as they were used in or in relation to the manufacture and clearance of goods up to the place of removal. He further refers to the CGST Act, 2017 to say that

the appellant had received the input services prior to the GST regime, but had paid the Service Tax only during March 2019 and hence, the appellant

was not able to transition the eligible input service credit, which had prompted the filing of the refund claim in question.

6.3 He further refers to Sub-Sections (1) to (5) of Section 142 of the CGST Act, 2017 and concludes that the refund claim of the appellant does not fit

into any of the provisions of Section 142 *ibid*; that the refund claim was not relatable to Section 11B of the Central Excise Act, 1944, as made

applicable to Service Tax. This finding and the rejection has been adopted in the impugned Order-in-Appeal, however, with an observation that the

appellant may be eligible otherwise for the CENVAT Credit of Service Tax paid by them under Reverse Charge Mechanism and that the only

provision for cash refund was under Rule 5 of the CENVAT Credit Rules, which is not the situation in the case on hand.

7. The Revenue having collected per force the Service Tax along with interest, the appellant is pushed into a situation where its refund claim is denied

and even the credit of Service Tax so paid is also not allowed to be availed, with the introduction of the CGST Act in 2017. It is the settled position of

law that a tax payer cannot be a victim of the change in law. In this regard, the reliance placed on the decision of the Honâ??ble High Court of

Madras in the case of *M/s. 3E Infotech v. CESTAT, Chennai* reported in 2018 (18) G.S.T.L. 410 (Mad.) is very apt, wherein it has been categorically

held that the Service Tax paid under mistake of law has to be refunded irrespective of the period covered as refusal thereof would be contrary to the

mandate of Article 265 of the Constitution of India.

8. In this view of the matter, I am of the opinion that the denial of refund is contrary to the settled position of law and accordingly, the impugned order

and the rejection of refund are set aside.

9. The appeal stands allowed with consequential benefits, if any, as per law.

(Order pronounced in the open court on 23.06.2021)