(2021) 10 CESTAT CK 0055

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 40269 Of 2021

M/s. PKF Sridhar And Santhanam LLP APPELLANT

Vs

Commissioner Of GST And Central Excise RESPONDENT

Date of Decision : 27-10-2021

Acts Referred:

Central Excise Act, 1944 — Section 11B
Constitution of India, 1950 — Article 265
Finance Act, 1994 — Section 83

Citation : (2021) 10 CESTAT CK 0055

Hon'ble Judges : Sulekha Beevi C.S., J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. Brief facts are that the appellant is engaged in providing Chartered Accountant's service, Intellectual Property Rights service etc. and is registered with the Service Tax Department. They filed their ST-3 returns for the period from April 2017 to June 2017 with much delay on 23.10.2018. The total service tax liability for the impugned period was Rs.78,37,359/-. The appellant used their CENVAT credit to the extent of Rs.16,84,478/- for discharging their service tax liability. The balance outstanding to be paid was Rs.61,52,881/-. However, instead of paying Rs.61,52,881/-, the appellant made payment of Rs.64,58,056/- towards discharging the service tax liability. Thus, there was an excess payment of Rs.3,05,175/- They filed a refund claim on 29.11.2018 for refund of the excess payment made by them. The original authority rejected the refund claim holding that the tax payment having been made vide challan dated 20.7.2017 and 1.6.2017, the refund claim filed on 29.11.2018 is beyond one year period as prescribed under section 11B of the Central Excise Act, 1944. In appeal, Commissioner (Appeals) upheld the same. Hence the appellants are now before the Tribunal.

2. The learned consultant Shri R. Chandrasekaran appeared and argued on

behalf of the appellant. He submitted that in the present case the provisions under section 11B of Central Excise Act, 1944 will not apply as the tax has been paid under mistake. He adverted to para 7.1 of the Order in Appeal and submitted that the department agrees that there is an excess payment made by the appellant. The amount was paid by mistake and is not covered under section 11B of Central Excise Act, 1944. He relied upon the decision of the jurisdictional High Court in the case of 3E Infotech Vs. CESTAT, Chennai as reported in 2018 (18) GSTL 410 (Mad) = 2018-TIOL-1268-HC-MAD-ST to argue that when the tax is paid by mistake, claim for refund cannot be barred by limitation. Similar view was taken by the Hon'ble High Court of Karnataka in the case of Way2Wealth Brokers Pvt. Ltd. Vs. Commissioner of Central Excise - 2021-TIOL-1969-HC-KAR-ST. He relied upon the decision of the Tribunal in the case of M/s. Bhavya Enterprises Vs. Commissioner of GST & Central Excise vide Final Order No. 40001/2019 dated 1.1.2019. Similar view was taken by the Tribunal in the case of M/s. Nilkamal Ltd. Vs. Commissioner vide Final Order No. 41607/2021 dated 23.6.2021. Further, in the case of Punjab National Bank Vs. Commissioner of Central Tax - 2021-TIOL-453-CESTAT-BANG, the situation of refund after the introduction of GST was considered.

3. The learned AR Shri R. Rajaraman appeared for the department.

4. Heard both sides.

5. The issue is with regard to rejection of refund claim on the ground that it is barred by limitation. The facts are clear from para 7.1 of the Order in Appeals which is reproduced as under:-

"The following undisputed points are discerned from the facts of the case. The ST3 return for the period April 2017 to June 2017, with a service tax liability of Rs.78,37,359/- was filed by the appellant on 23.10.2018 after a delay of 434 days. While discharging the above liability through cash and credit, the appellant had made an excess payment of Rs.3,05,175/-. The cash payment made vide challans were dated 20.7.2017 and 1.6.2017. the refund claim for such excess payment was filed on 29.11.2018 which was beyond the statutory time limit of one year prescribed under sec. 11B of the CEA, 1944 and accordingly the respondent, vide the impugned order, rejected the claim as time-barred.

It is the case of the appellant that the excess amount was paid by mistake and amounts paid under 'mistake of law' are not to be covered under sec. 11B of the CEA, 1944."

6. It is not disputed that the appellant has made excess payment of Rs.3,05,175/-. Returns were belatedly filed only on 23.10.2018. However, tax was paid by cash in advance vide challans dated 20.7.2017 and 1.6.2017. The department has computed the period of one year from these dates of the challan to hold that the refund claim is barred by limitation. It has to be mentioned that the appellant has come to know about the excess payment only after the filing of the returns on 23.10.2018. The refund claim having been filed on 29.11.2018

when computed from the date of filing of the ST-3 returns, it cannot be said that there is a delay in filing the refund claim. Section 11B of Central Excise Act, 1944 does not talk about the relevant date for computing the period of limitation in the case of payment of service tax. In various decisions, the Tribunal as well as the High Courts have held that relevant date for computation of one year would be the date of invoice / date of payment of service tax. These decisions were with regard to refund of credit on input services. In the present case, the refund arises out of excess payment. The excess payment can be ascertained only when the appellant files the ST-3 returns. When such facts are put into consideration, in strict sense, it cannot be said that there is a delay in filing the refund claim. It is an excess payment made by the appellant. Needless to say that the department cannot retain any amount which is not collected / paid under authority of law.

7. The jurisdictional High Court in the case of 3E Infotech (supra) has categorically held that section 11B cannot be applied when the tax has been paid under mistake and when not required to be paid. The relevant paragraph is as under:-

"11. A similar view has been taken by the Bombay High Court in the case of Parijat Construction v. Commissioner Excise, Nashik, reported in 2018 (359) E.L.T. 113 (Bom.), where the Bombay High Court has held as under :-

4. 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.

5. 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. 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. 8,99,9621/- 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.

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."

8. Similar view was taken by the Hon'ble High Court of Karnataka in the case of Way2Wealth Brokers Pvt. Ltd. (supra). Para 14 of the judgment is reproduced as under:-

"Considering 11B of the Act, 1944, a coordinate Bench of this Court in the case of Commissioner of Central Excise V. KVR Constructions (supra) has held thus:-

"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 of 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.

It has been thus observed that what one has to see is whether the amount paid by the assessee under a mistaken notion was refundable. Mere payment made by the assessee will neither validate the nature of payment nor the nature of transaction. The same could not make it service tax. When there is a lack of authority to collect such service tax not liable to be paid by the assessee, it would not give the department the authority to retain the amount paid by the assessee. Therefore, mere nomenclature would not be an embargo on the right of the petitioner to demand refund of payment made under a mistaken notion. This judgment has been confirmed by the Hon'ble Apex Court dismissing the appeal filed by the Revenue. Having regard to the facts and circumstances of the case, this judgment is squarely applicable to the case on hand."

9. This Tribunal in the case of Bhavya Enterprises (supra) and Nilkamal Ltd. (supra) has followed the decisions of the jurisdictional High Court.

10. Applying the above judgments / decisions, I am of the view that the rejection of refund claim as time-barred in terms of section 11B of Central Excise Act, 1944 r/w section 83 of the Finance Act, 1994 cannot sustain and requires to be set aside which I hereby do.

11. In the result, the impugned order is set aside. The appeal is allowed with consequential relief, if any.

(Pronounced in open court on 27.10.2021)