
(2021) 04 CESTAT CK 0008

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 50959 Of 2019

M/s Rakesh Canteen Contractor

APPELLANT

Vs

Commissioner, Central Excise Customs And Service Tax

RESPONDENT

Date of Decision : 01-04-2021

Acts Referred:

Central Excise Act, 1944 — Section 12B
Finance Act, 1994 — Section 83

Citation : (2021) 04 CESTAT CK 0008

Hon'ble Judges : Anil Choudhary, J

Bench : Single Bench

Advocate : Ankur Uppadhyay, Pradeep Gupta

Final Decision : Allowed

Judgement

1. This appeal has been filed against order-in-appeal whereby the Commissioner (Appeals) have upheld the credit of refund amount to Consumer Welfare Fund, holding that the refund claim is hit by unjust enrichment. The Commissioner (Appeals) has recorded the following findings:-

"7.1 I find that earlier appeal of refund claim of the appellant has been remanded on the specific ground that appellant is entitled for refund of service tax as claimed by them subject to the condition that the appellant shall provide the evidence, upto the satisfaction of refund sanctioning authority that incidence of tax has not been passed on by the appellant to any other person and it was also made clear that the onus of proof was on the appellant to prove that they had not passed on the burden of tax incidence to any other person.

8. I find that the show cause notice has been issued to the appellant to provide opportunity to produce documentary evidence of the service tax amount has not been passed on by them. I find that the appellant has submitted copy of letter dated 31.08.2016 of M/s Caparo Engineering India Limited in which it is mentioned that "in reference to above subject M/s Caparo Engineering India

Limited, Pithampur having service tax registration No. AABC7862NST012 & AABCC7862NST006 are exempted from service tax vide exemption Notification No. 14/2013-ST dated 22.10.2013 as amended Notification No. 25/2012-ST dated 20.06.2012. It was noticed that through oversight we had paid service tax amounting of Rs. 2,08,221/- & Rs. 2,19,346/-. Therefore you are requested to refund the amount of service Tax Rs. 2,08,221/- & Rs. 2,19,346/-, which is not supposed to be paid by us".

8.1 In this regard I find that the Adjudicating Authority has held that the appellant have received service tax amount from M/s Caparo Engineering India Limited, which was later on deducted by M/s Caparo Engineering India Limited. Here I find that the Adjudicating Authority hold that the appellant has failed to establish that service tax paid by M/s Caparo Engineering India Limited has not been recovered from the end user and that merely deducting service tax from the applicant does not prove that the service tax has not been recovered from the end user/ consumer. In this case, once the appellant has recovered the service tax from their client M/s Caparo Engineering India Limited and passed on the incidence of service tax, then it is presumed, in terms of Section 12B of Central Excise Act, 1944 read with Section 83 of Finance Act, 1994, that M/s Caparo Engineering India Limited who has paid this service tax has passed on the incidence of this tax to the ultimate users, unless proved otherwise. In this regard I rely upon ratio of judgment of Hon'ble Supreme Court vide order dated 29.08.2016, in the case of Commissioner of Central Excise, Madras vs. Addison & Co. Ltd., -2016 (339) ELT 177 (SC) wherein the Hon'ble Supreme Court has decided the issue of 'unjust enrichment' in similar circumstances. The relevant head note of the said decision is reproduced as under:-

"Refund - Unjust enrichment - Credit note to buyer for turnover discount - Duty component in turnover discount - assessee admitted that incidence of duty was originally passed on to buyer - No material brought on record to show that buyer the burden did not pass it on to any other person - HELD : Refund claimed by assessee is for amount which is part of Excise duty paid earlier and passed on. There is a statutory presumption under Section 12B of Central Excise Act, 1944 of duty being passed on - assessee who did not bear burden of duty, though entitled to claim deduction, could not seek its refund as he would be unjustly enriched - Assessee plea that credit note showed that duty component forming part of turnover discount was returned, rejected - as ultimate consumer who actually paid duty could not be identified, amount would be retained in fund and utilised for benefit of Consumers."

8.2 I find that above judgment of Hon'ble Supreme Court is squarely applicable to the facts of the case. I find that the Apex court decision cited by the appellant is earlier to above cited decision of Hon'ble Supreme Court. Also the cited decision of Hon'ble CESTAT is a decision of lower court. Hence both these case laws are of no help to them.

9. On this background, I find that no evidence has been brought on record by the

appellant to prove that the incidence of Service Tax paid by their client, M/s Caparo Engineering India Limited has not been passed on to any other person. Therefore, I find that the Adjudicating Authority has correctly held that the appellant has failed to discharge their burden in this regard. Therefore, I find that there is no reason to interfere in the impugned adjudication order."

2. The brief facts are that the appellant has been awarded canteen services contract from M/s Caparo Engineering India Limited, by way of running and managing their canteen located in their factory premises. The only issue involved in this appeal is under the facts and circumstances that - initially M/s Caparo Engineering India Limited paid the service tax to the appellant - service provider and later on the assumption that the said service is exempt, have deducted the amount of service tax admittedly from the subsequent bills of the appellant, which has been reflected in the ledger account of this appellant maintained in the books of M/s Caparo Engineering India Limited. The refund has been rejected on the presumption that the service tax burden must have been passed on to the workman/ staff of M/s Caparo Engineering India Limited (users of the canteen).

3. Assailing the impugned order the learned Counsel appearing for the appellant states that such presumption of having passed on the burden of service tax to the users of canteen is not available under the provision of service tax. It is further urged that the food has been provided as subsidized rate in the canteen for the workers / staff of M/s Caparo Engineering India Limited, as per the agreement between the appellant and M/s Caparo Engineering India Limited. Accordingly, learned Counsel prays for allowing their appeal with consequential benefits.

4. Learned Authorised Representative appearing for the Revenue has relied on the impugned order.

5. Having considered the rival contentions, I find that the appellant have not led evidence that there was no passing of the service tax burden to the end users of the canteen. In view of the contention of the learned Counsel at the bar that food has rather been given at subsidised rate, I allow this appeal by way of remand to the Adjudicating Authority with the direction to examine the agreement between the appellant and M/s Caparo Engineering India Limited, as well as other relevant documents like costing of food, price charged from the end users. If it is found that the company M/s Caparo Engineering India Limited have not passed on the burden of the service tax to their employees/ workers, the amount of refund shall be paid to the appellant. The appellant is directed to appear before the Adjudicating Authority with a copy of this order and seek opportunity of hearing.

6. Thus, the appeal is allowed by way of remand.

(Dictated and pronounced in open Court)