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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 07.09.2016

\+ **SERTA 26/2016, C.M. APPL.32831/2016**

MERA BABA REALTY ASSOCIATE (P) LTD. ..... Appellant

Through : Sh. Ruchir Bhatia, Advocate.

Versus

COMMISSIONER OF SERVICE TAX, DELHI ..... Respondent

Through : Sh. Pramod Kumar Rai, Sr.Standing Counsel with Sh. Deepak Anand, Jr. Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. Following question of law arises for consideration:

"*Did the Tribunal fall into error in holding that the refund claim made by the appellant was not maintainable?*"

2. Admit.

3. Issue notice. Sh. Pramod Kumar Rai, Advocate accepts notice.

4. The facts of the case are that the appellant is a builder engaged in construction activity. The levy of Service Tax was imposed by an amendment in the Finance Act, 1994 with effect from 01.07.2010. However, prior to that, apparently, the Service Tax Department had issued a Circular dated 16.02.2006, the effect of which was to advise all construction companies to pay Service Tax. The appellant complied and started depositing amounts for the periods in question, i.e. from 2006 onwards. On 24.04.2007, the appellant protested, contending that the amounts paid by

them were not covered by the levy and that they had to be refunded the said amounts. The said letter reads as follows:

"To,

The Superintendent,
Service Tax Division I
Delhi.

Sub: Payment of service tax in protest as per the Judgment dated 23.07.2007 in Revised Civil Mis. Writ Petition No.997 of 2006 decided by Allahabad High Court in case OF ASSOTECH REALITY PVT. LTD. VS. STATE OF U.P.

Sir,

We are paying Service Tax as a builder a lieu of decision of K. Reheja Development Corporation case. The Allahabad High Court has turned down the said Judgment in Revised Civil Misc. Writ Petition No.997 of 2006 decided on 23.03.2007 in case of Assotech Reality Pvt. Ltd. Vs. State of U.P. Accordingly being a builder, we are not liable to pay the service tax. However, we are depositing the service tax in protest with the condition that in case it is decided in favour of builder, the same would be refunded to us.

It is further submitted that, it is not applicable to the case at hand in as much as this decision was rendered on the facts of its own case, in our case, the company has not undertaken any construction work for and on behalf of proposed customer and the title, in the property so constructed, passes to the customer only on the execution of sale deeds and registration thereof. Until the time the sale deed is executed, the title and interest, including the ownership and possession in the construction made, remain with the company. The payment made by prospective purchasers, in instalments are aimed at facilitating purchase of the property by these probable purchasers so that they may not be required to pay whole of the price at a time.

Form the above, it cannot be inferred that the company us making construction for and on behalf of the probable customers.

In view of the position explained above, you are requested to look into the matter and refund the service tax.

Thanking you,"

5. The appellant filed a refund claim on 26.02.2009, disclosing all the particulars, in the prescribed format, i.e. Form-R under Section 11B of the Central Excise Act, 1944. This claim was rejected in its entirety. The order-in-original observed as follows:

"***ORDER***

In view of the above discussions & findings, I reject the refund claim of Rs.72,21,075/- (including interest amount Rs.47,633/-) being time barred and inadmissible, and also reject the rest of the amount Rs.32,67,569/- being inadmissible out of total refund claim amount Rs.1,04,88,644/- filed on 26.02.2009 under Section 11B of the Central Excise Act, 1944, which is also made applicable in the Service Tax matters by virtue of Section 83 of the Finance Act, 1994."

Sd/-
(SAHIL INAMDAR)
ASSISTANT COMMISSIONER"

6. The primary adjudicating authority was of the opinion that the application was time-barred. He took into account the fact that the assessee had voluntarily obtained registration and deposited amounts without protest and much later claimed that such amounts were not leviable. The order-in-original further observes that in the circumstances, there is no question of any amount being refunded. The first appellate authority took note of

previous orders of Central Excise and Service Tax Appellate Tribunal (CESTAT), notably in *M/s. Rubberwood India Pvt. Ltd. v. Commissioner of Customs* 2006 (206) ELT 536 and other decisions to say that the levy should be calculated from the date when the refund claim was originally filed and not from the date when the refund claim is subsequently filed in proper format before the appropriate authority. The appellate authority also noted that since the services in question, i.e. "construction" did not exist prior to its inclusion in Sections 65(105)(zzq) and (zzh) of the Finance Act, 1994 with effect from 01.07.2010, the amounts could be recovered only prospectively and not from a prior period. To this end, the CESTAT relied upon the decision reported as *Union Bank of India v. M/s. Martin Lottery Agency Ltd.* 2009-TIOL-60-SC-ST; *Indian National Shipowners' Association v. UOI* 2009 (14) STR 289 (Bom) etc. The appellate authority also took into consideration the Central Board of Excise and Customs Circular No.108/02/2009-ST dated 29.01.2009 and then concluded as follows:

> *"The Hon'ble Bombay High Court vide judgment in the case of Indian National Shipowners' Association Vs. Union of India 2009 (14) STR 289 (Bom) and specifically held as under:-*
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> *"**38....Introduction of new entry and inclusion of certain services in that entry would presuppose that was no earlier entry covering the said services.** Therfore, prior to introduction of entry (zzzz), the services rendered by the members of the 1st petitioner were not taxable. Creation of new entry is not by way of amending the earlier entry. It is not a carve out of the earlier entry. Therefore, the services rendered by the members of the 1st petitioner cannot be brought to tax under that entry.*
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> *In view of the above explanations inserted in the Section 65(105)(zzq) and (zzzh) w.e.f. 01.07.2010 and clarifications given by CBEC vide Letter D.O.F. No.334/03/2010-TRU dated*

1-7-2010, it is amply clear that if an agreement is entered into or any payment is received, for sale of complex or apartment in residential complex, service tax will be leviable on such transaction since the builder provides the construction service w.e.f. 01.07.2010 only in terms of principle laid down in the above mentioned judgments that Service Tax levied by virtue of new entry and explanation would be applicable prospectively only. In view of the above, I hold that the activities undertaken by the appellants were chargeable to Service Tax w.e.f. 01.07.2010 by virtue of Explanation inserted Section 65(105)(zzq) and (zzzh) on 01.07.2010 and were not taxable during the period prior to 01.07.2010 and the Service Tax paid by them during the period prior to 01.07.2010 was liable to be refunded to the appellants in terms of provisions of Section 11B of the Central Excise Act, 1944 as made applicable to like matters of Service Tax by virtue of Section 83 of the Finance Act, 1994.

8. In view of the above, I set aside the impugned order and allow the appeal with consequential relief.

Sd/-
(V.K. SINGH KUSHWAH)
COMMISSIONER (APPEALS)
CENTRAL EXCISE, DELHI-I"

6. The revenue appealed to the CESTAT which was of the opinion that since the appellant continued to deposit the amounts with the Service Tax Department after lodging protest, *per se* no question of refund of amounts for the prior period, i.e. payments made before 24.04.2007 arose. It, however, remitted the matter for calculation of amounts, and refund in respect of the period after the refund particulars had been made over in Form-R, i.e. after 24.04.2007.

7. It is contended on behalf of the appellant that the amounts deposited

prior to 24.04.2007 were covered by the refund claim and that the letter of the appellant made it clear that the amounts deposited in the past and payable thereafter were also under protest. It was submitted that since there is no denial of the fact that the levy was imposed for the first time by the amendment to the Finance Act, 1994 with effect from 01.07.2010, the amounts collected under the colour of a lawful expression could not be retained by the Service Tax authorities on the ground that the time for claiming the refund had expired. Learned counsel relied upon the second proviso to Section 11B and stated that if a protest is lodged, then the time period of one year provided for by Section 11 would be inapplicable.

8. Learned counsel for the respondent, on the other hand, contended that the impugned order of the CESTAT should not be interfered with since it had merely corrected the first appellate authority's order. That the appellant had made a refund claim in the appropriate form for the first time in 2009 is not denied. That it had also deposited and continued to deposit service tax amounts despite its understanding and claim that they were not liable is also not disputed. In the circumstances, there was no question of applicability of proviso to Section 11B and refund claim ought to have been made within the time prescribed. Since the refund claim here was neither in appropriate format nor unequivocal about the disclaimer of liability, the assessee was not entitled to refund of amounts for the period prior to 24.04.2007.

9. This Court is of the opinion that the CESTAT clearly fell into error of law. The proviso to Section 11B clearly indicates that if the amounts are paid under protest – (in this case, the protest was filed before the expiry of one year) - the limitation prescribed by the main portion, i.e. Section 11B(1) would not apply. Even otherwise, once it is admitted that the levy itself came

into force with effect from 01.07.2010 *per se*, amounts collected without authority of law fall beyond the imprint of expression or expropriation under pretence of authority of law. In these circumstances, the fundamental question of the appellant or any other assessee seeking recourse being restricted by the period of limitation under the statute authorising levy and its recovery should not arise. Furthermore, even if that reasoning were to be perused, the fact remains that the protest was lodged within reasonable time of the appellant becoming aware that the amounts were not recoverable as Service Tax. That is sufficient to attract proviso to Section 11B(1).

10. In the circumstances, we are of the opinion that the order of the CESTAT to the extent that it remitted the matter for calculation of only part of the amounts to be paid, is accordingly set aside. The order of the first appellate authority – Commissioner (Appeals) dated 06.05.2011 is restored. The appeal is allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

SEPTEMBER 7, 2016