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IN THE HIGH COURT OF DELHI AT NEW DELHI

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SERTA 4/2017

HT MEDIA LIMITED

..... Appellant

Through: Mr. Ashok Kumar Dhingra,
Ms. Smita Singh, Advocates.

versus

**THE COMMISSIONER OF SERVICE TAX AND
OTHERS & ANR.**

..... Respondents

Through: Mr. Sanjeev Narula, Senior Standing
Counsel for Department with
Mr. Abhishek Ghai, Advocate.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE PRATHIBA M. SINGH

ORDER

08.08.2017

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Dr. S. Muralidhar, J.:

1. This appeal under Section 35 G (1) of the Central Excise Act 1944 (CE Act) read with Section 83 of the Finance Act, 1994 against an order dated 10th January 2017 of the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') dismissing the Appellant's appeal against the order-in-appeal dated 10th November 2009 of the Commissioner of Customs, Excise and Service Tax (Appeals) [hereafter Commissioner (Appeals)].

2. **Admit.** The following question of law is framed for consideration:

Whether the Customs, Excise and Service Tax
Appellate Tribunal was in error in rejecting the

plea of the Appellant/Assessee that its claim for refund of the service tax paid under the state of law is barred by limitation in terms of Section 11B of the Central Excise Act, 1944?

3. The facts, in brief, are that the Appellant is *inter alia* engaged in the business of printing of newspapers and providing space for advertisements in newspapers. The Appellant obtained registration with jurisdictional Service Tax authority *inter alia* for providing services under taxable category of 'Sale of Space or Time for Advertising Services' with effect from 1st May, 2006.

4. It is stated that the Appellant provided services of 'sale of space or time for advertising services' to various clients and raised invoices on them and thus, calculated service tax payable on the billed amount for the period between May, 2006 and January, 2007. The Appellant states that sometimes the invoices were only part realised, i.e. the invoices issued for services for the aforementioned period were realised in the subsequent period. It is accordingly averred that the Petitioner "paid excess amount for the Relevant Period equivalent to difference between amount paid on billed amount and Service Tax payable on realised amount for services during the Relevant Period."

5. The appellant filed a refund application on 25th September, 2007 before the Assistant Commissioner of Service Tax, Division-I, New Delhi ('Assistant Commissioner') for refund of the excess amount of Rs.

14,92,703/- paid as service tax during the aforementioned period. The said application came to be disposed of by the Assistant Commissioner by an order dated 28th July, 2008, *inter alia*, allowing the refund of Rs. 10,69,249/- and rejecting the refund of Rs. 4,23,454/- on the ground that the said refund claim was barred by limitation under Section 11B of the CE Act. In other words, according to the Assistant Commissioner, the aforementioned refund claim for Rs. 4,23,454/- pertained to period prior to 25th September, 2006.

6. The appeal filed by the Appellant against the above order was dismissed by the Commissioner (Appeals) by an order dated 10th November 2009. Thereafter the Appellant went in appeal before the CESTAT, which by the impugned order dated 10th January 2017, dismissed the appeal.

7. Mr. Ashok Kumar Dhingra, learned counsel for the Appellant, has placed reliance, *inter alia*, on the judgments of this Court in ***Hind Agro Industries Limited v. Commissioner of Customs 2008 (221) ELT 335 (Del)*** and ***Alar Impex Private Limited v. Commissioner of Central Excise, Delhi-I 2016 (41) S.T.R. 407 (Del)*** to urge that the CESTAT was in error in holding that the Appellant's claim for refund was barred by limitation. According to him since the service tax was not payable twice, the provision of Section 11B (1) of the CE Act would not apply to the claim for refund of the excess service tax paid.

8. Mr. Sanjeev Narula, learned Senior Standing counsel for the Respondents, on the other hand, has placed reliance on the decisions in ***Kochar Sung-Up Acrylic Limited v. CEGAT 2004 (175) ELT 81 (P&H)*** and ***Mafatlal***

Industries Limited v. Union of India 1997 (89) ELT 247 (SC).

9. In both, ***Hind Agro Industries Limited*** (*supra*) and ***Alar Impex Private Limited*** (*supra*), the question examined was whether the levy in question, which was cess in one case (***Hind Agro***) and service tax in the other (***Alar Impex***), was at all payable in the first instance. As far as the levy of cess is concerned, this Court in ***Hind Agro Industries Limited*** (*supra*) held that it was outside the purview of 'customs duty' under Section 27 of the Customs Act, 1962. In ***Alar Impex Private Limited*** (*supra*), this Court found that the CESTAT had failed to satisfy itself that the “services rendered by the appellant were, on facts, amenable to service tax”. Where the services rendered were not amenable to service tax, the question of applying for refund under Section 11B of the CE Act would not arise.

10. Here, however, the facts are different. The Appellant does not dispute that it is liable to pay service tax for the services rendered by it. In such a situation, it is abundantly clear that the Appellant has to seek refund of service tax, paid in excess, in terms of and within the limitation period stipulated under Section 11B of that CE Act i.e. before the expiry of one year from the relevant date. The expression ‘relevant date’ has been defined in clause (f) of Explanation (B) to Section 11B of the CE Act as “the date of payment of duty”.

11. In considering the application for refund by the Appellant filed on 25th September 2007, the Assistant Commissioner ascertained which part of the claim pertained to the period prior to 26th September, 2006. In fact, the

Appellant itself set out, in a table in its refund application, the dates on which payment of service tax was made by it. What has been rejected by the Assistant Commissioner is the claim for refund of service tax paid by the Appellant prior to 25th September, 2006. Such claim was clearly barred by limitation in terms of Section 11B (1) of the CE Act. Since the payment of service tax during the said period was not under protest, the Appellant was unable to take advantage of the second *proviso* under Section 11B (1) of the CE Act which states that the limitation of one year will not apply where any duty and interest has been paid under protest.

12. That being the position, the impugned order of the CESTAT affirming the above order of the Assistant Commissioner, and the consequential order of the Commissioner (Appeals) does not suffer from any legal infirmity. The question framed is, accordingly, answered in the negative, i.e. in favour of the Department and against the Appellant.

13. The appeal is dismissed with no orders as to costs.

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S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 08, 2017/j