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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 173 OF 2017

The Commissioner of Service Tax, Mumbai – VII, Commissionerate … Appellant

Versus

M/s. Blue Star Ltd. …Respondent

Mr. J.B. Mishra, for the Appellant.
Mr. K.C. Prusty, for the Respondent.

CORAM: M.S.SANKLECHA & RIYAZ I. CHAGLA, JJ.
DATED: 11TH SEPTEMBER, 2018.

PC:-

1. This Appeal under Section 83 of the Finance Act, 1994 (Act) read with Section 35G of the Central Excise Act, 1944 takes exception to the order dated 24th September, 2014 passed by the Customs, Excise and Service Tax Appellate Tribunal (Tribunal).

2. The Revenue urges only the following questions of law for our consideration :-

> "***(a) Whether the services provided by the Respondent herein qualify as export of service under the provisions of Export of Services Rules, 2005"?***
>
> ***(b) Whether the CESTAT is right in holding that the Respondent herein are entitled for refund when there is no application made under the prescribed format under the relevant provisions of law and without complying the procedural formalities prescribed under the law"?***

3. The Respondent having erroneously paid service tax on the export of service and had sought refund of the sum of Rs. 50,40,411/- under Section 11B of the Central Excise Act read with Section 83 of the Act as falling within the Export of Taxable Service Rule, 2005. This being the service tax paid for the period August 2005 to July, 206. The service provided by the Respondent to their foreign clients was of procuring purchase orders for them. On the purchase orders being communicated to foreign clients, they are supplying goods to the intended buyers in India, directly. The impugned order of the Tribunal allowed the Respondent's Appeal seeking a refund of service tax paid over for the period August, 2005 to July, 2006 as claimed. This by placing reliance upon the decision of this Court in ***SGS India (P) Ltd. Vs. Commissioner of Service Tax***[1]

4. **Re.:- Question No.1.**

(i). We find that an identical nature of service as rendered by the Respondent to its foreign clients had come up for consideration before this Court in ***Commissioner of Service Tax, Mumbai – VI Vs. ATE Enterprises (P) Ltd.***[2.] In the above case, this Court followed its earlier decision of ***SGS (Supra)*** held that the service of procuring orders and

1 34 STR p.554

2 2018 (8) GSTL p.123.

passing it to overseas manufacturers / clients and receiving the payments for the same is an activity of export of service. Thus qualifies as Export of Service under the Export of Taxable Service Rules, 2005.

(ii) Mr. Mishra, learned counsel appearing in support of the Respondent is not able to point out any distinguishing features in the present facts which would warrant non-application of decision of this Court in ***ATE (Supra)*** to the present facts.

(iii) In above view, the question (a) as proposed does not give rise to any substantial question of law as the issue on merits stands concluded against Revenue and in favour of the Respondent by the decision of this Court. Thus not entertained.

5. **Re.:- Question (b)**

(i) Mr. Mishra the learned counsel appearing for the Appellant states that the refund claim was granted even when the issue of unjust enrichment has not been considered by the Tribunal.

(ii) The question as proposed does not make any grievance with regard to the allowing of refund on account of unjust enrichment. We find that in the refund application dated 13 October 2006 the Respondent had clearly stated that refund is not hit by unjust enrichment as the service tax was paid out of the commission received by them. Consequent to refund application dated 13th October, 2006, the revenue issued show cause notice dated 5th December, 2006. The show cause notice is not annexed to the appeal memo filed by the Revenue. However on reading the order in original it appears that no ground to reject the refund application on ground of unjust enrichment seems to have been raised by the Revenue. Therefore, from the facts available on record, it was never the case of the Revenue that there was unjust enrichment on the part of the Respondent – Assessee. It seems to have accepted the assessee's stand that there is no unjust enrichment was made in the refund application. As at no point of time before the first Authority or Appellate Authorities was the issue of unjust enrichment raised by the Appellant either in the submissions and / or by filing the cross appeals / cross objections to the Appellate Authorities.

(iii) Accordingly, this submission of Mr. Mishra, learned counsel appearing for the Revenue is in the present facts without any basis. Therefore the question as proposed does not give rise to any substantial question of law. Thus not entertained.

6. Accordingly, the Appeal is dismissed. No order as to costs.

(RIYAZ I. CHAGLA J.) **(M.S.SANKLECHA, J.)**