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

\+ SERTA 13/2019 & CM Appl. 17372-74/2019

COMMISSIONER CENTRAL EXCISE
& SERVICE TAX,CENTRAL TAX
DELHI SOUTH COMMISSIONERATE .....Appellant

Through: Ms. Sonu Bhatnagar, Senior Standing Counsel with Mr. Vaibhav Joshi, Ms. Anushree Narain, Advocate

versus

M/S V3S INFRATECH LIMITED .....Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

<u>O R D E R</u>

% **12.04.2019**

<u>C.M. Appl. No. 17373/2019 (condonation of delay)</u>

For the reasons stated in the application, the same is allowed and the delay in filing the appeal is condoned.

Application stands disposed of.

<u>SERTA 13/2019 & CM Appl. 17372 & 17374/2019</u>

The Revenue urges a question of law with respect to the CESTAT order, submitting that it had not examined the provisions of the principle of unjust enrichment while setting aside the Commissioner's order refusing the refund.

The assessee worked as a subcontractor to the National Building Construction Corporation (NBCC), for construction of works of the Employees' State Insurance Corporation (ESIC) Hospital and Central Reserve Police Force (CRPF) barrack. The assessee/respondent appears to have deposited certain amounts on a mistaken assessment of its liability to pay service tax. When it sought a refund, a substantial part of the refund was allowed – to the tune of over Rs.1 crore. However, the refund was refused on two grounds; (1) that the assessee was a sub-contractor – as regards the barracks and consequentially (2) the principle of unjust enrichment (section 11B) would apply. The CESTAT noticed that the Commissioner had not considered the fact that to apply Section 11B, no notice or separate hearing is granted to the assessee. On this ground as well as on the ground of the question of limitation could not have arisen in this case. CESTAT allowed the appeal.

It is urged that the substantial question in respect of applicability of Section 11B arises in this case and that there was no necessity in the show cause notice to specifically mention its invocation in terms of the Statute.

This court is of the opinion that no substantial question of law arises. It is immediately apparent that the service tax department has taken two contrary positions – while allowing the substantial sum of over Rs.1 crore as refund, for the same work, i.e. as sub-contractors in respect of hospitals, no impediment or difficulty was faced. However, in respect of the construction of residential barracks, a para military organisation of the State, an entirely different approach for the sub-contractor appears to have been taken. This is completely illogical and could have been the only ground on which the CESTAT could have set aside the refusal. This court is also of the opinion that the CESTAT's view that separate show cause notice is necessary under Section 11B is in consonance with the principle of fairness. If a general show cause notice is issued, invoking Section 11, there is no automatic assumption that the assessee would be faced ultimately with an order, under Section 11B. In this case, the assessee in fact applied for refund. It was all the more incumbent upon the authority to put the assesee to notice about the likely application of section 11B.

In the view taken by this court, no substantial question of law arises. The appeal is accordingly, dismissed.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

APRIL 12, 2019
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