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

% **Date of decision: 20 September 2023**

+ **SERTA 3/2021**

COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX. Appellant

Through: Mr. Harpreet Singh, Sr. SC
with Mr. Arunesh Sharma, Mr.
Jatin Kumar, Advs.

versus

ORIENTAL INSURANCE COMPANY LIMITED

..... Respondent

Through: Mr. Yogendra Aldak, Mr.
Kunal Kapoor, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER

% **20.09.2023**

YASHWANT VARMA, J. (ORAL)

1. The **Department of Central Excise and Service Tax**¹ is in appeal against the order of the **Customs, Excise & Service Tax Appellate Tribunal**² dated 09 January 2020. The CESTAT has in essence dealt with and accepted the claim of the assessee for being accorded a refund of service tax which had been deposited by it. It has thus proceeded to set aside the order dated 17 March 2016 passed by the Commissioner (Appeals).

2. At the outset, we note that the Deputy Commissioner, Central Excise and Service Tax in its order dated 17 October 2014 rejected the

¹ Department

² CESTAT



refund of service tax on the basis that the refund claim was filed beyond the time limit prescribed under Section 11B of the **Central Excise Act, 1944**³. On appeal by the respondent before the Commissioner (Appeals), Central Excise, the Appellate Authority in its order dated 17 March 2016 affirmed the rejection of refund of service tax by placing reliance on the judgment of the Supreme Court in **Mafatlal Industries Ltd. and Others vs. Union of India and Others**⁴.

3. Further, the Appellate Authority also observed that the respondent's refund claim was hit by the principle of unjust enrichment as embodied in Section 11B of the Act. The relevant part of the order is extracted hereinbelow:

“....Although the instant case involves refund of service tax payments made by the appellant for the period May 2011 to November 2011 and it is presumed that they stopped paying Tax on the same after that, yet they contend that they came to know of this mistake only on 27.08.2013 when the state Government informed them and subsequently filed a claim after 3 months. The appellant has given no cogent explanation for this delay in filing the claim. The appellant could always have taken the recourse to adjustment of the said tax under the provisions of Rule 6 of the Service Tax rules, on the other tax liabilities incurring on related provisions of output services in the same field, had they kept themselves updated about the exemption notification. Further, the appellant could have also availed the relief of refund of the same as per relevant provisions of FA 1994 read with CESA 1944. The appellant has also not submitted any documentary evidence at the appellate stage in support of their claim of having not received service tax from the State Government of Uttar Pradesh or the burden of the same was not passed on to the ultimate consumer of the impugned output service. The said claim is thus also hit by the principle of unjust enrichment as specified under section 11B of the CESA 1944. Therefore, the AA has rightly rejected the refund claim of the appellant as time barred as per applicable provisions

³ Act

⁴ (1997) 5 SCC 536



of section 11B of the CESA 1944.”

4. Thereafter, post the CESTAT’s impugned order of 09 January 2020 according refund of service tax, the respondent filed its application for refund dated 29.01.2020, in respect of which the concerned authority, vide its Order-in-Original dated 24 July 2020, granted the refund, along with interest from the date of the CESTAT’s impugned order to the date of sanction of refund. The concerned authority, however, and while dealing with the issue of unjust enrichment in paragraph 15.1 of the said order held as follows: -

“15.1 Doctrine of Unjust Enrichment

As regards the doctrine of unjust enrichment is concerned, I find that the principle of unjust enrichment is not applicable in this case as amount in question was deposited by the Claimant as Service Tax even though it was exempted from payment of Tax by Central Government Notification ibid. That they contested the said claim and the Hon'ble CESTAT vide its Final Order No.50011/2020 dated 09.01.2020 held that claimant would be entitled to refund the claim with interest and accordingly allowed the appeal.”

5. Aggrieved by the aforesaid order with respect to the grant of interest, the respondent is stated to have preferred an appeal. The Appellate Authority in its order dated 26 March 2021 held in favour of the respondent and granted interest on the principal refund amount from the expiry of three months from the date of filing the refund application dated 23 December 2013 (i.e., from 22 March 2014), till the date of refund of the amount, as stipulated under S.11BB of the Act. The Appellate Authority in this order however did not deal with the issue of unjust enrichment, as observed by the concerned authority in the Order-in-Original dated 24 July 2020.



6. Having dealt with the history of the litigation between the parties, we note that when the matter reached the CESTAT against the Appellate Authority's order dated 17 March 2016, arguments appear to have been addressed principally on the issue of limitation as constructed in terms of Section 11B of the Act and whether in the facts of the present case, the claim was liable to be rejected on that score.

7. We may note before proceeding further that there is no dispute inter partes with respect to the respondent not being liable to pay service tax in terms of the provisions made in the **Finance Act, 1994**⁵. It may only be additionally noted that the respondent was engaged in the general insurance business and was registered with the Service Tax Department under the categories of "General Insurance Service" and "Re-insurance Services". It had been engaged by the Government of Uttar Pradesh to provide insurance services under the Rashtriya Swasthya Bima Yojana. Undisputedly, in terms of the Notification dated 01 March 2011, exemption was accorded under Section 65(105)(d) of the 1994 Act in respect of services provided by an insurer to any person, for providing insurance under the scheme as aforementioned.

8. However, and inadvertently, the respondent continued to pay service tax between March 2011 to November 2011 till that mistake was ultimately rectified. This led to the filing of a refund claim on 23 December 2013. The CESTAT has taken note of various decisions rendered by different High Courts and which had held that where

⁵ The 1994 Act



service tax had been paid under a mistake, there would exist no justification for the assessee being bound by the period of one year as prescribed under Section 11B of the Act, and that in such a situation, it would be the date when the mistake was discovered which would be relevant.

9. We note that two Division Benches of our Court have also answered the aforesaid issue in favour of the respondent as would be evident from the decisions rendered in **National Institute of Public Finance and Policy vs. Commissioner of Service Tax**⁶ as well as **Alar Infrastructures Private Limited vs. Commissioner of Central Excise, Delhi-I**.⁷ Dealing with the question which stands posited, the Court in *National Institute* had held as under: -

“4. Concededly, at the relevant time service tax was not payable for any of the functions or work undertaken or performed by the appellant/assessee. In these circumstances, under a wrong impression that it was liable to service tax, the assessee was levied certain amounts. Subsequently, upon inquiry, it was informed by CBEC on 13.04.2009 that its activities were not taxable. Soon thereafter, it sought refund of the amounts deposited. The Deputy Commissioner refunded part of the amount but disallowed refund of Rs. 11,49,090/- on the ground that the application was filed after a lapse of period of one year. The Assessee unsuccessfully filed an appeal to CESTAT which appears to have relied upon the judgment of the Supreme Court in *Collector of Central Excise, Chandigarh v. Doaba Co-operative Sugar Mills*, 1988 (37) E.L.T. 478 (S.C.).

5. Counsel for the assessee contends that when the amount in question was never payable as there was no levy at all, the question of denying the refund of part payment did not arise and that the general principal of limitation will be applicable from the date of discovery of mistaken payment in the present case. So the refund claim is made within the stipulated period of the limitation.

⁶ 2018 SCC Online Del 10812

⁷ Order dated 14.10.2015 in CEAC No. 11/2015



6. Counsel for the Revenue, on the other hand, relied upon the judgment of the Supreme Court in *Collector of C.E., Kanpur v. Krishna Carbon Paper Co.*, 1988 (37) ELT 480 (SC). Relying upon the said judgment, it is submitted that the refund claim before a departmental authority is to be made within the four corners of the statute and the period of limitation prescribed in the Central Excise Act and the Rules framed there-under.

7. This court is of the opinion that the CESTAT clearly fell into error. *Krishna Carbon Paper Co.* (supra) was a case where principal duty was payable; excess amount had been paid on a mistaken notion with respect to the liability for excess production under a notification which was later discovered to be not correct. In the present case, levy never applied - a fact conceded by no less than the authority of CBEC. In these circumstances, the general principle alluded to in *Krishna Carbon Paper Co.* (supra) would apply. Consequently, the appeal has to succeed and is therefore allowed. The appellant shall be entitled to refund of entire amount with proportionate interest."

10. Identical conclusions came to be rendered by the Division Bench in *Alar Infrastructures*. We deem it apposite to extract paragraphs 3 and 4 of the report hereinbelow: -

"3. Having heard the submissions of counsel for the parties, this Court finds that the question of applicability of Section 11B of the CE Act read with Section 83 of the Finance Act, 1994 to the refund application of the Appellant would arise only if the CESTAT came to the conclusion that the services rendered by the Appellant were in fact liable to service tax. If, on the other hand, the CESTAT finds that the services rendered by the Appellant were not amenable to service tax at all, the question of processing the refund application of the Appellant with reference to Section 11B of the Act would not arise. This legal position has been made explicit in the context of a claim for refund under the Customs Act, 1962 in the decision of this Court in **Hind Agro Industries Limited v. Commissioner of Customs 2008 (221) ELT 336 (Del.)**. In that decision the Court has discussed the legal position emerging from the decision of the Supreme Court in **Mafatlal Industries v. Union of India 1997 (89) ELT 247 (SC)**.

4. Consequently, the Court is of the view that the CESTAT ought to have first satisfied itself that the services rendered by the Appellant was, on facts, amenable to service tax and different from the other three appeals which were heard together with the



Appellant's appeal and allowed by the same impugned order. If and only if the CESTAT finds that the services rendered by the Appellant were in fact amenable to service tax would it then take up the question whether in terms of Section 11B of the Central Excise Act, 1944 and the claim of the refund was barred by limitation."

11. We note further that dealing with the question of service tax mistakenly paid, the Karnataka High Court in **Commissioner of Central Excise Bangalore vs. KVR Construction**⁸ made the following observations and explained the legal position in the following terms: -

"19. From the reading of the above section, it refers to claim for refund of duty of excise only, it does not refer to any other amounts collected without authority of law. In the case on hand, admittedly, the amount sought for as refund was the amount paid under mistaken notion which even according to the Department was not liable to be paid.

20. According to the appellant, the very fact that the said amounts are paid as service tax under the Finance Act, 1994 and also filing of an application in form R of the Central Excise Act would indicate that the applicant was intending to claim refund of the duty with reference to section 11B, therefore, now it is not open to him to go back and say that it was not refund of duty. No doubt in the present case, form R was used by the applicant to claim refund. It is the very case of the petitioner that they were exempted from payment of such service tax by virtue of circular-dated September 17, 2004 and this is not denied by the Department and it is not even denying the nature of construction/services rendered by the petitioner was exempted from to payment of service tax. What one has to see is whether the amount paid by the petitioner under mistaken notion was payable by the petitioner: Though under the Finance Act, 1994 Such service tax was payable by virtue of notification, they were not liable to pay, as there was exemption to pay such tax because of the nature of the institution for which they have made construction and rendered services. In other words, if the respondent had not paid those amounts, the authority could not Have demanded the petitioner to make such payment. In other words, the authority lacked authority to levy and collect such

⁸ 2010 SCC Online Kar 5419



service tax. In case, the Department were to demand such payments, the petitioner could have challenged it as unconstitutional and without authority of law. If we look at the converse, we find mere payment of amount, would not authorize the Department to regularise such payment. When once the Department had no authority to demand service tax from the respondent because of its circular dated September 17, 2004, the payment made by the respondent-company would not partake the character of “service tax” liable to be paid by them. Therefore, mere payment made by the respondent will neither validate the nature of payment nor the nature of transaction. In other words, mere payment of amount would not make it a “service tax” payable by them. When once there is lack of authority to demand “service tax” from the respondent-company, the Department lacks authority to levy and collect such amount. Therefore, it would go beyond their purview to collect such amount. When once there is lack of authority to collect such service tax by the appellant, it would not give them the authority to retain the amount paid by the petitioner, which was initially not payable by them. Therefore, mere nomenclature will not be an embargo on the right of the petitioner to demand refund of payment made by them under mistaken notion.

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24. Now, we are faced with a similar situation where the claim of the respondent/assessee is on the ground that they have paid the amount by mistake and therefore they are entitled for the refund of the said amount. If we consider this payment as service tax and duty payable, automatically, section 11B would be applicable. When once there was no compulsion or duty cast to pay this service tax, the amount of Rs. 23,96,948 paid by petitioner under mistaken notion, would not be a duty or “service tax” payable in law. Therefore, once it is not payable in law there was no authority for the Department to retain such amount. By any stretch of imagination, it will not amount to duty of excise to attract section 11B. Therefore, it is outside the purview of section-11B of the Act.”

12. Similar is the view which has been taken by the Bombay High Court in **Parijat Construction vs. Commissioner of Central Excise, Nashik.**⁹ It would thus appear that High Courts across the board have

⁹ 2017 SCC Online Bom 9480



taken a consistent view that where once it is found that the assessee was not liable to be subjected to a service tax, it would not be bound by the limitation as prescribed under Section 11B of the Act.

13. This would also appear to appeal to reason since undisputedly and in terms of Article 265 of the Constitution, the Union can only levy a tax which is authorized by law. Since it is conceded before us that the respondent was not liable to pay any service tax, it would be wholly unjust to permit the Union to retain monies which were not liable to be collected or were authorized by law. We find that an identical view has been expressed by a Division Bench of the Madras High Court in **3E Infotech vs. CESTAT, Chennai**.¹⁰ We deem it appropriate to reproduce the relevant extracts from that decision hereinbelow :-

“7. The present appeal lies from the order of the Appellate Tribunal. We have heard the Learned Counsel for the Assessee and the State. The issue, which arises for consideration in this case, whether the provisions of Section 115 of the Central Excise Act would be applicable to claim of refund made by an Assessee when the tax has been paid under mistake of law. In this case, indisputably, there was no liability on the petitioner to pay service tax. The Supreme Court of India, in the case of *Union of India v. ITC Ltd.* reported in 1993 Supp (4) SCC 326 : (1993) 67 ELT 3 (S.C.) while dealing with the question of refund of excess excise paid held:-

8. In *Shri Vallabh Glass Works Ltd. v. Union of India*, this Court, while examining the question as to what is the point of time from which the limitation should be deemed to commence observed that relief in respect of payments made beyond the period of three years may not be granted from the date of filing of the petition, taking into consideration the date when the mistake came to be known to the party concerned. Just as an assessee cannot be permitted to evade payment of rightful tax, the authority which recovers tax

¹⁰ 2018 SCC Online Mad 13637



without any authority of law cannot be permitted to retain the amount, merely because the tax payer was not aware at that time that the recovery being made was without any authority of law. In such cases, there is an obligation on the part of the authority to refund the excess tax recovered to the party, subject of course to the statutory provisions dealing with the refund.

9. We are, therefore, of the opinion that the High Court, while disposing of the writ petition under Article 226 of the Constitution of India, was perfectly justified in holding that the bar of limitation which had been put against the respondent by the Collector of Central Excise (Appeals) to deny them the refund for the period September 1, 1970 to May 28, 1971, and June 1, 1971 to February 19, 1972 was not proper as admittedly the respondent had approached the Assistant Collector Excise soon after coming to know of the judgment in *Voltas* case and the assessee was not guilty of any laches to claim refund.

8. In the above cited case, the Supreme Court stated that the Assessee's claim to refund would not be disallowed solely because it seemed barred by limitation. Since the Assessee in that case made the claim for refund shortly after learning about their entitlement for the same, it would not be just to hold that such claim is hit by laches.

9. The High Court of *Gujarat in Oil and Natural Gas Corporation Ltd., v. Union of India*, reported in (2017) 354 ELT 577 (Guj.) relied on another judgment of the Gujarat High Court in *Joshi Technologies International, INC-India Projects v. Union of India* = (2016) 339 ELT 21 (Guj.) and quoted the relevant paragraph, which reads as under:-

“Merely because the provisions of the Central Excise Act, 1944 and the rules framed thereunder for collection and refund viz., the machinery provisions have been incorporated in the OID Act for collection and refund of the cess levied thereunder, it cannot be inferred that the Oil Cess imposed under the provisions of the OID Act assumes the character of central excise duty. The finding recorded by the adjudicating authority that the Oil Cess is in the nature of excise duty, is erroneous and contrary to the law laid down by this court in *Commissioner v. Sahakari Khand Udyog Mandli Ltd.* (supra).



In the Circular dated 7th January, 2014, reference to sugar cess and tea case levied under the Sugar Cess Act, 1982, and the Tea Act, 1953, respectively, is merely illustrative in nature and what is meant by the circular is that the cesses which are collected by the Department of Revenue, but levied under an Act which is administered by different Department are not chargeable to Education Cess and Secondary and Higher Secondary Cess chargeable under the provisions of the Finance Acts, 2004 and 2007, respectively.

Education Cess and Secondary and Higher Secondary Education Cess being cesses levied at a percentage of the aggregate of all duties of excise, the basic requirement for levy thereof is the existence of excise duty. In the present case Oil Cess is not a duty of excise and hence, the basic requirement of levy of such cesses is not satisfied. Furthermore, for the purpose of levy of Education Cess and Secondary and Higher Secondary Education Cess, two other conditions precedent, are required to be satisfied, viz., (i) that the duty of excise should be levied by the Central Government in the Ministry of Finance (Department of Revenue); and (ii) the duty of excise should be collected by the Central Government in the Ministry of Finance (Department of Revenue). In the present case, since the machinery provisions of the Central Excise Act, 1944 and the rules framed thereunder have been incorporated in the OID Act, the second condition precedent is satisfied, viz. that the cess is collected by the Central Government in the Ministry of Finance (Department of Revenue); however, the first condition with regard to levy of such duty of excise by the Central Government in the Ministry of Finance (Department of Revenue) is not satisfied inasmuch as the Oil Cess under the OID Act is levied by the Ministry of Petroleum and Natural Gas. In the aforesaid premises, the requirements of Section 93 of the Finance Act, 2004 and Section 138 of the Finance Act, 2007 are not satisfied in the present case, and consequently, the said provisions have no applicability to the facts of the present case. The petitioner, therefore, cannot be said to have been liable to pay Education Cess and Secondary and Higher Secondary Education Cess under the above provisions.

In the facts of the present case, the refund is claimed on the ground that the amount was paid under a mistake of law and such claim being outside the purview of the



enactment, can be made either by way of a suit or by way of a writ petition. The petitioner was, therefore, justified in filing the present petition before this court against the order passed by the adjudicating authority rejecting its claim for refund of the amount paid under a mistake.

Since Oil Cess is not a duty of excise, the amount paid by the petitioner by way of Education Cess and Secondary and Higher Secondary Education Cess, cannot in any manner be said to be a duty of excise inasmuch as what was paid by the petitioner was not a duty of excise calculated on the aggregate of all the duties of excise as envisaged under the provisions of Section 93 of the Finance Act, 2004 and Section 138 of the Finance Act, 2007. Thus, the amount paid by the petitioner would not take the character of Education Cess and Secondary and Higher Secondary Education Cess but is simply an amount paid under a mistake of law. The provisions of Section 11B of the Central Excise Act, 1944 would, therefore, not be applicable to an application seeking refund thereof. The petitioner was therefore, wholly justified in making the application for refund under a mistake of law and not under section 11B of the Central Excise Act, 1944.

Since the provisions of Section 11B of the Act are not applicable to the claim of refund made by the petitioner, the limitation prescribed under the said provision would also not be applicable and the general provisions under the Limitation Act, 1963 would be applicable. Section 17 of the Limitation Act *inter alia* provides that when a suit or application is for relief from the consequences of a mistake, the period of limitation would not begin to run until the plaintiff or applicant has discovered the mistake, or could, with reasonable diligence, have discovered it. Since the period of limitation begins to run only from the time when the applicant comes to know of the mistake, the application made by the petitioner was well within the prescribed period of limitation. Moreover, since the very retention of the Education Cess and Secondary and Higher Secondary Education Cess by the respondents is without authority of law, in the light of the decision of this court in *SioastikSanitarywares Ltd. v. Union of India* (supra), the question of applying the limitation prescribed under Section 11B of the CE Act would not arise.

Even in case where any amount is paid by way of self assessment, in the event any amount has been paid by



mistake or through ignorance, it is always open to the assessee to bring it to the notice of the authority concerned and claim refund of the amount wrongly paid. The authority concerned is also duty bound to refund such amount as retention of such amount would be hit by Article 265 of the Constitution of India which mandates that no tax shall be levied or collected except by authority of law. Since the Education Cess and Secondary and Higher Secondary Education Cess collected from the petitioner is not backed by any authority of law, in view of the provisions of Article 265 of the Constitution, the respondents have no authority to retain the same.

If the adjudicating authority was not satisfied with the Chartered Accountant's certificate and the other material produced by the petitioner, he could have called upon the petitioner to produce further documentary evidence in support of its claim that it had not passed on the incidence of duty to the purchaser. However, without affording a reasonable opportunity to the petitioner to produce documentary evidence in support of its claim that there was no unjust enrichment, the adjudicating authority was not justified in holding that there was unjust enrichment. Therefore, the finding that the petitioner's claim is hit by unjust enrichment cannot be legally sustained.

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11. Further, the claim of the respondent in refusing to return the amount would go against the mandate of Article 265 of the Constitution of India, which provides that no tax shall be levied or collected except by authority of law.

12. On an analysis of the precedents cited above, we are of the opinion, that when service tax is paid by mistake a claim for refund cannot be barred by limitation, merely because the period of limitation under Section 11B had expired. Such a position would be contrary to the law laid down by the Hon'ble Apex Court, and therefore we have no hesitation in holding that the claim of the Assessee for a sum of Rs. 4,39,683/- cannot be barred by limitation, and ought to be refunded. There is no doubt in our minds, that if the Revenue is allowed to keep the excess service tax paid, it would not be proper, and against the tenets of Article 265 of the Constitution of India. On the facts and circumstances of this case, we deem it appropriate to pass the following directions:—



(a) The Application under Section 11B cannot be rejected on the ground that is barred by limitation, provided for under Section.

(b) The claim for return of money must be considered by the authorities.”

14. In view of the aforesaid, we find no ground to interfere with the view as expressed by the CESTAT which has taken note of the broad consensus struck by various High Courts on the question including the decision rendered by this Court in *National Institute*. The decisions that we have noticed above, came to be rendered post *Mafatlal* and which judgment of the Supreme Court has also been duly noticed and explained.

15. This only leaves us to deal with the issue of unjust enrichment. We note that the Order-in-Original dated 24 July 2020 while dealing with the aforesaid aspect has held in favour of the assessee solely on the ground that since service tax was not liable to be deposited, the question of unjust enrichment would not be applicable. As noted hereinbefore, the Appellate Authority in appeal against this order did not deal with the issue of unjust enrichment in its order dated 26 March 2021. However, prior to the passing of the CESTAT's impugned order dated 09 January 2020, when the matter reached the desk of the Appellate Authority against the Adjudicating Authority's order dated 17 October 2014, it was noted that the assessee had not submitted any documentary evidence to establish that the incidence of tax had not been passed on.

16. We note that the CESTAT, however, has completely failed to allude to this aspect of the matter. In view of the above, we are of the considered opinion that while its decision is liable to be upheld, the assessee would be obliged to place adequate material before the



concerned Assessing Authority, establishing that the incidence of service tax was not passed on. This since the issue of unjust enrichment and the burden so placed on the assessee is found in the principal provision of Section 11B of the Act itself.

17. We were informed at the conclusion of the hearing that the refund has already been granted along with interest. In that view of the matter, let appropriate material be placed for the consideration and satisfaction of the competent Assessing Authority by the respondent.

18. We, accordingly, dismiss the appeal of the Department subject to the observations made hereinabove.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

SEPTEMBER 20, 2023

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