CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Service Tax Appeal No. 88084 of 2019

(Arising out of Order-in-Appeal No. PUN-CT-APPII-0000-039-040-19-20 dated 22.08.2019 passed by the Commissioner (Appeals), Central Tax, Pune II)

Guardian Landmarks LLP **.....Appellant**
Chintamani Pride, Office no. 102,
S.No.12/7+8, CTS NO.670,
Near City Pride, Kothrud, Pune

VERSUS

Commissioner of Central Excise & Service Tax, Pune II **.....Respondent**
ICE House, 41-A, Sasoon Road, Sangamvadi
Pune.

With

Service Tax Appeal No. 88085 of 2019

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Pune.

APPEARANCE:

Shri Viraj Reshamwala, Advocate for the appellant
Shri S.B. P. Sinha, (AR) for the respondent

CORAM:
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/85923-85924/2023

DATE OF HEARING : 13.12.2022
DATE OF DECISION : 06.06.2023

Per: AJAY SHARMA

These appeals have been filed assailing the impugned order 22.08.2019 passed by the Commissioner (Appeals), Central Tax, Pune II rejecting the appeal filed by the appellant.

2. The issue herein is about the refund of Service Tax amount on the advance amount returned/ refunded to the buyer, upon the cancellation of the flats booked by the said buyer?

3. The facts of the matter in brief are as follows. The appellant is engaged in providing *Construction of Residential Complex Service*. They constructed a residential complex *Wind* Shire at Nandoshi Village, Pune. Two customer viz. Ms. Sushma G. Ketkar and Ms. Sayali S. Wankar had booked their respective flats in the said project and entered into a duly registered sale agreement dated 26.4.2016 and paid the part payment alongwith service tax. The service tax paid by them of Rs.37,176/- and Rs.47,617/- respectively was deposited by the appellant with the exchequer. Later on due to some reasons both the bookings were cancelled by the customers on 20.6.2018 and the entire payment made by them was refunded to them by the appellant. The customers asked for refund of service tax amount

also therefore on their behalf the appellant seeks refund of service tax amount of Rs.37,176/- and Rs.47,617/- respectively as the said customers were not registered with the Service Tax Authorities. Upon which the department issued two show cause notices dated 1.4.2019 proposing to reject the refund claim being time barred in view of Section 11B of the Central Excise Act, 1944. The Adjudicating Authority vide Orders-in-Original dated 9.4.2019 and 11.4.2019 respectively rejected both the refund claims u/s.11B ibid. On appeal filed by the appellant, the learned Commissioner (Appeals) upheld the adjudication order and rejected the appeal.

4. I have heard learned counsel for the appellant and learned Authorised Representative for the Revenue and perused the case records including the written submissions/synopsis placed on record. The first principle of service tax is that tax is to be paid only on the services which are taxable under the said statute and for that purpose there has to have some *'service'*. Unless service is there no service tax can be imposed. If any service has been provided which is taxable as specified in the Finance Act, 1994 as amended from time to time then certainly the assessee is liable to pay, but when no such service has been provided then the assessee cannot be saddled with any such liability and in that case the amount deposited by the assessee with the exchequer will be considered as *'deposit'* only and keeping the said amount by the department is violative of Article 265 of the Constitution of India which specifically provides that

"No tax shall be levied or collected except by authority of law." It is not the case of the department that the appellant is raising a fake claim. The only ground of rejection is section 11B ibid. When no service has been provided, as the booking has been cancelled, then how the tax on it can be retained by the exchequer and in what capacity? This amount has been paid by the customers and when they have cancelled the booking they want to get refund of their entire amount including the amount of service tax paid by them separately, which they are entitled to. Since Service Tax in issue, is not backed by any authority of law, the department has no authority to retain the same. Buyer booked the flat with the appellant and paid some consideration. The appellant as a law-abiding citizen entered the same in their books of accounts and paid the applicable service tax on it after collecting it from the buyer. But once the said bookings have been cancelled, where is the question of providing any service by the appellant to those customers. If there is no service then question of paying any tax on it does not arise and the department can't keep it with them as service tax. Once the buyer cancelled the booking and the consideration for service was returned, the service contract got terminated and once it is established that no service is provided, then refund of tax for such service become admissible.

5. In view of the peculiar facts of this case, the appellant cannot be said to be liable to pay service tax as no service has been provided and the amount paid by them would not take the

character of tax. The provisions of Section 11B *ibid* would, therefore, not be applicable to such applications and the question of applying the limitation prescribed u/s.11B *ibid* would not arise. A similar view has already been taken by this Tribunal in the matter of *Service Tax Appeal No. 85076 of 2021, Final Order No. A/86159/2022 dated 8.12.2022*, the relevant paragraphs of which are reproduced hereunder:-

> *"7. In view of series of decisions it is clear that the appellant cannot be said to be liable to pay service tax in any manner whatsoever inasmuch as what was paid by the appellant was not tax as envisaged under the Finance Act, 1994. Thus, the amount paid by the Appellant would not take the character of tax but is simply an amount paid under a mistake of law. The provisions of Section 11B ibid would, therefore, not be applicable to an application seeking refund thereof. Moreover, since the retention of the amount in issue by the department is without authority of law, the question of applying the limitation prescribed under Section 11B ibid would not arise. Even in case where any amount is paid by way of self assessment, if it 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. For a service to be taxable, it is necessary that the service has to be rendered by one person to another and without a perceived service money contribution cannot be held to be a consideration which is liable to tax. The authority concerned is 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 Service Tax received by the*

concerned authority is not backed by any authority of law, in view of the provisions of Article 265 of the Constitution, the authority concerned has no right to retain the same. A similar view has been taken by the Hon'ble High Court of Judicature at Bombay in the matter of Parijat Construction v. Commissioner Excise, Nashik, reported in 2018 (359) E.L.T. 113 (Bom.). by holding that limitation prescribed under Section 11B of Central Excise Act, 1944 not applicable to refund claims for Service Tax paid under mistake of law. The relevant paragraphs of the said decision are reproduced as under:-

> *"5. We are of the view that the issue as to whether limitation prescribed under Section 11B of the said Act applies to a refund claimed in respect of service tax paid under a mistake of law is no longer res integra. The two decisions of the Division Bench of this Court in Hindustan Cocoa (supra) and Commissioner of Central Excise, Nagpur v. M/s. SGR Infratech Ltd. (supra) are squarely applicable to the facts of the present case.*
>
> *6. Both decisions have held the limitation prescribed under Section 11B of the said Act to be not applicable to refund claims for service tax paid under a mistake of law. The decision of the Supreme Court in the case of Collector of C.E., Chandigarh v. Doaba Co-Operative Sugar Mills (supra) relied upon by the Appellate Tribunal has in applying Section 11B, limitation made an exception in case of refund claims where the payment of duty was under a mistake of law. We are of the view that the impugned order is erroneous in that it applies the limitation prescribed under Section 11B of the Act to the present case were admittedly appellant had paid a Service Tax on Commercial or Industrial Construction Service even though such service is not leviable to service tax. We are of the view that the decisions relied upon by the Appellate Tribunal do not support the case of the respondent in rejecting the refund claim on the ground that it was barred by limitation. We are, therefore, of the view that the impugned order is unsustainable."*

8. Hon'ble High Court of Judicature at Madras in the matter of 3E Infotech Versus CESTAT, Chennai; 2018 (18) G.S.T.L. 410 (Mad.) also took similar view on identical issue and held 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. The relevant paragraphs of the said decision are reproduced as under:-

> *"12. 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.*
>
> *13. 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.*
>
> *14. 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."*

9. On similar lines, this Tribunal also in the matter of Javed Akhtar vs. CGST, Mumbai West; [2021] 132 taxmann.com 166 (Mumbai - CESTAT) in Service Tax Appeal No. 85611 of 2019, vide order dated 09.11.2021 has held that retention of any amount by the department which was paid by the appellant therein without any liability or in excess of the liability violates Article 265 of the Constitution of India."

6. In view of the discussions made hereinabove, I am of the view that the appellant is entitled for the refunds as claimed by them. Accordingly the appeals filed by them are allowed, with consequential relief, as per law.

(Pronounced in open Court on 06.06.2023)

(Ajay Sharma)
Member (Judicial)

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