CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70696 of 2021

(Arising out of Order-in-Appeal No.165/CE/ALLD/2021 dated 23.06.2021 passed by Commissioner (Appeals) CGST & Central Excise, Allahabad)

M/s Jalan Con Cast Ltd., **.....Appellant**
(Nakha Jungle No.2, P.O. Jungle Beni Madhav,
Fertilizer Factory, Gorakhpur)

VERSUS

Commissioner of Central GST &
Central Excise, Varanasi **....Respondent**
(Allahabad)

APPEARANCE:

Shri Nishant Mishra, Advocate for the Appellant
Shri Sandeep Pandey, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.- 70022/2024

DATE OF HEARING : 04 December, 2023
DATE OF PROUNCEMENT : 12, January, 2024

P. K. CHOUDHARY:

The Appellant has challenged Order-in-Appeal No.165/CE/ALLD/2021 dated 23.06.2021 passed by the Ld. Commissioner (Appeals), by which the appeal filed by the revenue has been allowed and the Order-in-Original No.13 (MP) (Refund) 2019 dated 26.12.2019 has been set aside.

2. The facts of the case in brief are that the Appellant is engaged in manufacturing of M.S Ingots, M.S bars etc. It is the case of the Appellant that on 18.04.2012, the Appellant was subjected to searches by the Officers of DGCEI. During investigation, searches were again conducted by the Officers of the Central Excise Commissionerate, Allahabad on 23.08.2012 and 13.10.2012. During the searches, the Officers alleged non-payment/short-payment of duty and the Appellant was coerced

to handover two cheques of Rs.20 lakhs each, with an assurance that the remaining amount of Rs.40 Lakhs shall be paid during investigation. That on the insistence of the Officers, the Appellant deposited an amount of Rs.30 Lakhs through e-challans dated 19.10.2012 and 29.10.2012. However, as no show cause notice was issued in respect of the non-payment/short-payment of duty, hence the Appellant submitted letter dated 08.02.2013 seeking refund of Rs.30 Lakhs.

3. As per the Appellant, it was only after the letter dated 08.02.2013 was submitted, show cause notice dated 06.06.2013 was issued alleging non-payment/short payment of duty and appropriation of amount deposited by the Appellant. The show cause notice was adjudicated by Order-in-Original dated 17.06.2014 wherein part of demand of duty was confirmed against the Appellant, amount of Rs.30 Lakhs was appropriated and penalties were imposed on the Appellant and some other persons. The said Order-in-Original dated 17.06.2014 was challenged by the Appellant and others and also by the revenue before this Tribunal and by Final Order No.71687–71692/2018 dated 31.07.2018, the appeal filed by the Appellant and others was allowed and the appeal filed by the Revenue was dismissed.

4. The Appellant then filed application dated 03.09.2019 for refund of Rs.30 Lakhs deposited during investigation, which upon verification, was allowed vide Order-in-Original dated 26.12.2019 sanctioning refund of Rs.30 Lakhs by holding that the amount was deposited under-protest and in terms of second proviso to Section 11B (1) of the Central Excise Act, 1944 (‘the Act’), the limitation of one year shall not apply.

5. Aggrieved with the said Order-in-Original dated 26.12.2019, the Revenue preferred appeal before the Ld. Commissioner (Appeals) and by the impugned order dated 23.06.2021, the Ld. Commissioner (Appeals) allowed the appeal filed by the revenue and set-aside the Order-in-Original dated 26.12.2019 by holding that the bar of limitation under Section 11B (1) is applicable and since the refund claim was filed after

period of one year from the date of the order passed by this tribunal, the claim is barred by limitation.

6. Ld. Counsel for the Appellant submitted that since the payment of Rs.30 lakhs was made under-protest, the same does not bear the character of duty and therefore Section 11B (1) of the Act, which is applicable only for refund of duty of Excise and interest, has no applicability. He has also submitted that assuming without conceding that the amount of Rs.30 lakhs bear the character of duty, then also the bar of limitation of one year shall not be applicable, in terms of the second proviso to Section 11B (1). Lastly, he also argued that since in terms of order passed by this Tribunal, the Appellant was not liable to pay any single amount of duty, hence the amount of Rs.30 lakhs cannot be retained by the revenue as Article 265 of the Constitution prohibits levy or collection of tax except by authority of law.

7. Per-contra, the ld. DR appearing for the revenue has relied upon and reiterated the findings recorded in the impugned order.

8. Heard both sides and perused the appeal records.

The issue in this appeal is that whether the bar of limitation under Section 11B (1) of the Act would be applicable in the facts and circumstances of the present case.

9. From the records of the case, it is clear that the amount of Rs.30 Lakhs was deposited by the Appellant under-protest during the course of investigation, which came to be appropriated in the adjudication order. Further, on appeal being filed, this Tribunal vide Final Order dated 31.07.2018 allowed the appeal filed by the Appellant and dismissed the appeal of the revenue, which order attained finality, in absence of any challenge being made.

The jurisdictional High Court i.e. the Hon'ble Allahabad High Court in **Ebiz.com Pvt. Ltd. v. Commissioner of Central Excise 2017 (49) S.T.R 389 (All)** while dealing with similar facts has considered the issue of refund, as under:-

> ***19.*** *We have to examine, if there is any provision applicable to the facts of the case in dealing with the demand of petitioner for refund of the amount along*

with interest or whether in general law, petitioner can be held entitled to such relief.

21. *In the present case, the amount in question, refund whereof is claimed, was not paid. It is not such amount of duty which was deposited by assessee. To check evasion of 'Excise duty' or 'Service Tax', raid was conducted on 12-1-2007, when during raid, sum of Rs. 25,55,000/- was got deposited. Amount of interest thereon was subsequently realized from petitioner on 29-3-2007 i.e. before issue of notice on 3-7-2007. Such deposit was involuntary by petitioner since no one shall deposit a huge money without creation of liability in law. Such an amount has been held to be a pre-deposit and principles of unjust enrichment has been held inapplicable in such cases.*

23. *It has been consistent view [of] various Courts that any amount, deposited during pendency of adjudication proceedings or investigation is in the nature of deposit made under protest or pre-deposit and, therefore, principles of unjust enrichment would not be attracted.*

35. *The consensus of the authorities of various High Courts as well as Supreme Court is that any amount received by Revenue, as deposit or pre-deposit i.e. unauthorizedly or under mistaken notion, etc., cannot be retained by Revenue since it has no authority in law to retain such amount and it must be refunded with interest.*

10. Thus, the jurisdictional High Court after referring to a catena of judgments has categorically held that the amount deposited during pendency of adjudication proceedings or investigation is in the nature of deposit made under-protest or pre-deposit and therefore principles of unjust enrichment would not be attracted. The jurisdictional High Court also categorically held that such an amount cannot be retained by revenue, as it has no authority to retain such amount and it must be refunded along with interest.

11. The Hon'ble Delhi High Court in **Alar Infrastructures Private Limited v. Commissioner of Central Excise, Delhi [Order dated 14.10.2015 in CEAC No.11/2015]** has considered the question of applicability of Section 11B of the Act in cases where the assessee is not liable to pay service tax:-

> ***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."*

Similar view has been taken by Hon'ble Karnataka High Court in **Commissioner of Central Excise Bangalore v. KVR Construction 2010 SCC OnLine Kar 5419**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.*

Recently, the Hon'ble Delhi High Court has also in **Commissioner of Central Excise v. Oriental Insurance Company Limited 2023 SCC OnLine Del 6065** has, after referring to a catena of judgments has held as under:-

> ***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.....*

12. In the present case, when admittedly the Appellant is not required to pay any amount, then the Appellant was clearly entitled to refund of the amount deposited under-protest and consequently the revenue has no authority to retain such amount as it would be in violation of Article 265 of the Constitution.

13. The Hon'ble High Courts of Bombay, Madras, Telangana and Calcutta have similarly held that refunds of amounts paid under mistake of law would not be hit by the statutory limitation periods, in the following judgments:-

i. Parijat Construction vs. CCE, Nashik [2018 (9) G.S.T.L. 8 (Bom.)]

"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.

7. We accordingly allow the present appeals and quash and set aside the impugned order, insofar as it is against the appellant in both appeals. We fully allow refund of Rs.8,99,962/- preferred by the appellant. We direct that the respondent shall refund the amount of Rs.8,99,962/- to the appellant within a period of three months. There shall be no order as to costs."

ii. 3E Infotech vs. CESTAT [2018 (18) GSTL 410 (Mad.)]

"9. 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

…

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."

iii. VasudhaBomireddy vs. Assistant Commissioner of Service Tax [2020 (35) GSTL 52 (Telangana)]

"18. Having regard to these decisions, we are of the opinion that if the petitioners were not liable to pay „service tax" on the transaction of the purchase of the constructed area along

with goods apart from undivided share of land at all, the payment which was made by the petitioners would not be a payment of service tax at all; that the department also could not have demanded payment of the same from the petitioners; and merely because the petitioners made the payment, it would not partake the character of „service tax" and the department cannot retain the amount paid by the petitioners which was in fact not payable by them."

iv. Parimal Ray vs. Commissioner of Customs (Port) [2015 (318) ELT 379 (Cal.)]

"17. Now I will consider the point of limitation. A person to whom money has been paid by mistake by another person, becomes at common law a trustee for that other person with an obligation to repay the sum received. This is the equitable principle on which Section 72 of the Contract Act, 1872 has been enacted. Therefore, the person who is entitled to the money is the beneficiary or cesti qui trust. When the said sum of Rs. 360.46 lakhs was paid by mistake by the petitioner to the Government of India, the latter instantly became a trustee to repay that amount to the petitioner. The obligation was a continuing obligation. When a wrong is continuing there is no limitation for instituting a suit complaining about it. (See Section 22 of the Limitation Act, 1963). The Supreme Court through Mr. Justice Krishna Iyer opined in Shiv Shankar Dal Mills v. State of Haryana reported in AIR 1980 Supreme Court 1037 as follows:-

1. Where public bodies, under colour of public laws, recover people's money, later discovered to be erroneous levies, the Dharma of the situation admits of no equivocation. There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs. Now is it palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of 'alternative remedy' since the root principle of law married to justice, is ubi jus ibiremedium.

2. Another point, in our jurisdiction social justice is a pervasive presence; and so, save in special situations it is fair to be guided by the strategy of equity by asking those who claim the service of the judicial process to embrace the basic rule of distributive justice, while moulding the relief, by consenting to restore little sums, taken in little transactions, from little persons, to whom they belong."

14. In view of the aforesaid analysis, it is concluded that the statutory limitation period prescribed under Section 11B is not

applicable to the refund claimed by the Appellant since the amount paid by the Appellant is not a tax.

15. In view of the above discussions, the present appeal is allowed. The Appellant shall be entitled to the refund amount along with interest.

(Order pronounced in open court on 12th January, 2024)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

LKS