

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. IV

SERVICE TAX APPEAL No. 52742 of 2019

(Arising out of Order in Order-in-Appeal No.269 (SM) ST/JPR/2019 dated 11.07.2019 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jaipur)

M/s. Ramesh Kumar Agarwal
Astitva, B-Block, Opp.Vijay Sarita,
Lohagal, Panchsheel Nagar,
Ajmer (Raj.) - 305001

...Appellant

Versus

**Commissioner of
Central Excise & Central GST, Jaipur-I**

....Respondent

APPEARANCE:

Mr.Goyal Rajesh, Advocate for the appellant
Mr. P. Juneja, Authorized Representative for the Respondent

CORAM : HON'BLE Ms. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/Decision: **25/06/2021**

FINAL ORDER No. 51646/2021

RACHNA GUPTA

Present appeal has arisen out of Order-in-Appeal No.269 dated 11.07.2019. The aforesaid order has been passed based on following facts:-

M/s. Ramesh Kumar Agarwal, Astitva, the appellant herein has his Service Tax Registration for providing construction of residential houses. One Mr. K.K. Agarwal had booked the flat with appellants Astitva and he made the payment of Rs.8.5 Lakhs vide different challans/Bill of entry No.001 and 004 for Rs.5 Lakhs and Rs.3.5 Lakhs respectively. In addition, Shri K.K. Agarwal made payment of service tax amount of Rs.38,250/-.

2. The Appellant had paid the service tax for the period October 2016 to March, 2017 on 25.10.2016, 14.02.2017 and 01.03.2017 of an amount of Rs.1,22,833/- for the impugned services. However, the said customer Shri

K.K. Agarwal got the booking of flat cancelled. Consequent thereto, the appellant had returned Rs.8.5 Lakhs to Shri K.K. Agarwal. The said customer demanded the amount of Service tax paid by him too also to be returned. The appellant, accordingly, filed a refund claim of the said service tax amount of Rs.38,250/-.

3. During the scrutiny of said claim, Department formed an opinion that appellant will gain unjust enrichment, as the service tax has already been collected from the customer. Accordingly, a show cause notice No.2091 dated 28.05.2018 was served upon the appellant proposing the rejection of the claim not only on the ground of unjust enrichment, but also, for the claim to be barred by time, it being filed after one year of the deposit of service tax. The said proposal was initially confirmed vide Order-in-Original No.05/2018-19 dated 10.07.2018 and appeal thereof has been rejected vide the order under challenge. Appellant is now before this Tribunal:

4. Though none is present for the appellant as on date, however, it is observed that appellant has filed the written submissions with the prayer that his personal presence may not be impressed upon and that the present appeal may be decided as per the submissions forwarded in writing by him. Written submissions are perused. Order under challenge has been assailed by the appellant on the ground that since the amount of service tax paid by the buyer of the flat, has to be returned to the said buyer after the buyer cancelled the deal and appellant has returned the amount as was received as part payment from said buyer. It is written in the submission that in the given circumstances the question of unjust enrichment to the appellant does not at all arise. Accordingly, the findings of the Commissioner are prayed, to be set aside.

5. As far as the time bar issue is concerned, it is mentioned in the written submission that though the time limit for claiming refund is within one year but one year has to be reckoned from the relevant date. In the given facts and circumstances, the relevant date is not the date of deposit of service tax, but it is the date when entire sale consideration of the flat agreed to be sold by the appellant to Shri K.K. Agarwal was refunded to the later when he cancelled the said deal. He is now entitled to get refund of Rs.38,250/- as well as was paid by him against service tax. Hence, date of demand by him is the relevant date. The decision of Allahabad Bench of this Tribunal in the case of **CCE, Lucknow Vs. Eldeco Housing & Industries P. Ltd. reported in 2016 (45) STR 200 (Tri.-All.)** has been impressed upon and the order under challenge is prayed to be set aside.

6. Per-contra, learned D.R. has submitted that there is nothing placed on record by the appellant, as far as, the demand of refund of service tax amount, which have been paid by the customer Shri K.K. Agarwal is concerned. It is submitted that in the absence of said details, the burden stands passed on to the customer. Hence, there is no infirmity when the Commissioner (Appeals) had rejected the refund claim on the ground of unjust enrichment. With respect to the plea of limitation, it is submitted that as per Section 11B of Finance Act, 1944, the date of deposit of service tax is the relevant date. The impugned claim is beyond one year of the said date, hence, the claim has rightly been held to be barred by time. Impressing upon no infirmity in the order under challenge, Id. D.R. has prayed for the appeal to be dismissed.

7. After hearing the parties and perusing the record, it is apparent that Shri K.K. Agarwal had agreed to purchase the residential unit from the

appellant and accordingly, had paid the sale consideration of Rs.8,50,000/- alongwith the amount of Rs.38,250/- towards Service Tax liability of the appellant. Apparently and admittedly, said amount of service tax has been paid by the appellant to the Department. The another apparent fact is that the deal for sale of the said residential unit stands cancelled and the appellant has returned the amount of sale consideration i.e. Rs.8,50,000/- to the buyer of the flats Shri K.K. Agarwal. Rs.38,250 were also supposed to be refunded to him in the given circumstances, though the same has not yet been paid by the appellant. From that perspective it appears to be a case of unjust enrichment to the appellant. But there is enough acknowledgment on part of appellant that the said amount has to be returned to the customer, once it is refunded. As the said amount stands already paid to the Department, the Department is liable to refund the same. Hence I hold the Commissioner (Appeals) has erred while refusing the refund on ground of unjust enrichment. The similar situation and the impugned issue stands already decided as is apparent from the decision relied upon by the appellant in the case of **Eldeco Housing & Industries pvt. Ltd. (supra)** wherein it has been held:

"5.....Further I hold that, as it has been clarified by the C.B.E. & C. that service tax was not payable on the transactions of the appellant with respect to construction and sale of flats during the financial year 2006-07, the deposit of tax made by the assessee takes the character of deposit, and is not tax. The doctrine of unjust enrichment is attracted only in the case of deposit of tax. Further from the perusal of documents, and the orders of the Court below, I find that the adjudicating authority have examining in detail the issue of unjust enrichment. The issue of time-bar was also verified, as well as the amount refundable, and there is no interference required. So far the appeal of the assessee is concerned, I find that although the assessee is not entitled to refund of Rs. 16,85,956/-, but it is customers of the assessee, who purchased flats, are entitled to the refund. It appears, the appellant have filed the details of his customers, with the Revenue in the adjudication of the refund proceedings. The assessee also mentioned that the customers are pressing for refund and some of them have also approached various judicial forums, including the Consumer forum. In view of this matter, I set aside the impugned order

and remand the issue back to the adjudicating authority, who shall examine the whereabouts of the person's who deposited the service tax to the appellant, for the purchase of flats, and after such verification having been carried out, shall grant refund to the buyers of the flats out of the said amount of Rs. 16,85,956/-. The appellant is also directed to furnish the names, parentage and proper addresses of the buyers of the flats, with the details of the amount collected from them on account of service tax and the deposit of tax with the Revenue. The appellant shall also extend any further co-operation as required by the adjudicating authority in the matter. The adjudicating authority shall issue the refund cheques in favour of the respective buyers of the flats, to which the appellant-assessee shall not be entitled to make any objection."

I find no reason to differ from the said decision. However, the purchaser in the present case is just one hence 'remand' is not deemed appropriate. Appellant can be held duty-bound to submit receipt of the amount of refund issued by the said purchaser.

8. Coming to the plea of issue being barred by time, I hold that no doubt the service tax was deposited by the appellant on 4th October, 2016 and 24 October, 2016 and the refund claim has been filed on 7th May, 2018 which is absolutely beyond one year from the date of deposit. But admittedly post the said deposit the circumstances arose due to which the transaction value against which the aforesaid service tax was paid, was got returned to the customer due to sale of the flat being not finalized. The said amount of sale consideration was returned to the customer Shri K.K. Agarwal on 15 October, 2017. It is post this date that the necessity arose to return the amount of Rs.38,250/- also, as was collected from the said customer to discharge the service tax liability of the appellant.

" **11 B(B)** "relevant date" means, -

- (a).....
- (b).....
- (c).....
- (d).....
- (e).....
- [(ea).....]

[(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;]

[(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate

Tribunal or any court, the date of such judgment, decree, order or direction;]

The aforesaid provision applies to present case.

9. The date of adjustment in the present case is the date when the money received by appellant need to be refunded alongwith the amount of service tax.

10. Accordingly, I am of the opinion that the period of one year, in the given facts and circumstances, shall reckon from 15.10.2017 when appellant returned the amount of sale consideration to Shri K.K. Agarwal instead of 04.10.2016. The refund claim filed on 7th May, 2018 therefore, stands very much within the period of one year. Learned Commissioner (Appeals) is opined to have ignored the peculiarity of facts and circumstances of the present case and is observed to have formed very rigid opinion. The order under challenge is, therefore, liable to be set aside. I draw my support from the decision of **CCE, Pune vs. Ispat Profiles India Ltd. reported in 2007 (220) ELT 2018 (Tri.-Mumbai)**, where it has been held that the date of reversal should be considered as the date of payment giving rise to the cause of action.

11. Further, this Tribunal in the case of **Hexacom (I) Ltd. vs. CCE, Jaipur reported as 2006 (3) STR 131 (Tri. – Delhi)** has clarified that there can never be a bar to return the amount which invites the service tax liability and date of said return shall be the relevant date for the purpose of the refund claim as was clarified by Tribunal, Mumbai in the case of **Prachar Communications Ltd. v. CCE, Mumbai-IV reported as 2006 (2) STR 492 (Tri. – Mumbai)** wherein it was held that “*when assessee paid back*

excess service tax by them to their customers, entitled to adjustment of same in terms of Rule 6 of Service Tax Rules, 1994 and this having been done by them, they would be entitled to refund of excess tax paid by them”.

12. In view of entire above discussion, it is hereby held that both the grounds taken by the Commissioner (Appeals) for rejecting the refund claim are held to be against the appreciation of the relevant facts of the present case. The order, accordingly, is hereby set aside. However, the appellant is directed to return the amount to Shri K.K. Agarwal within 15 days of receiving the said amount from the Department against the intimation thereof to the Department. The Department is held at liberty to take appropriate action, in case of non-compliance. Appeal, accordingly, stands allowed.

[Order pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita