

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

REGIONAL BENCH – COURT NO.405
Service Tax Appeal No. 85611 of 2019

(Arising out of Order-in-Appeal No. NA/GST/A-III/MUM/284/18-19 dated 06/12/2018 passed by the Commissioner (Appeals)-III, GST & CX, Mumbai)

M/s Shri Javed AkhtarAppellant
702 Sagar Samrat Green
Fields, Juhu Mumbai,
Maharashtra
400049

VERSUS

CCGST, Mumbai WestRespondent
Mahavir Jain Vidyalaya,
Juhu Lane, Andheri(West),
Maharashtra 400058

APPEARANCE:

Mr. Girish Agarwal, Chartered Accountant for the Appellant
Mr. Dilip Shinde, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

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

FINAL ORDER NO. A/87103 / 2021

Date of Hearing: 23.08.2021
Date of Decision: 09.11.2021

PER: AJAY SHARMA

This Appeal has been filed against the order dated 06/12/2018 passed by the Commissioner (Appeals)-III, GST & CX, Mumbai in Order-in-Appeal No. NA/GST/A-III/MUM/284/18-19.

2. The issue involved in this Appeal is whether the appellant is entitled for refund of service tax paid under protest without challenging the assessment proceedings, which was held to be not

payable by authorities concerned in an appeal of another assessee of the very same transaction?

3. The appellant herein was a co-writer alongwith Mr.Salim Khan of film '*Zanjeer*' somewhere in the year 1973. They undertook literary work viz. script, screenplay and dialogue of that film. Much later a film by the same name was produced in the year 2013 by Reliance Big Entertainment Pvt. Ltd. (in short 'Reliance'). Aggrieved, the appellant and Mr. Salim Khan jointly filed a suit being *Suit No. 424 of 2013 titled as Salim Khan & Anr. Vs. Sumeet Prakash Mehta & Ors.* before the Hon'ble High Court of Judicature at Bombay against Reliance Big Entertainment Pvt. Ltd. for infringement of copyright, claiming damages to the tune of Rs. 6 crores. In the said Suit out of Court settlement was made and a payment of Rs. 2 crores each was made by Reliance to the Appellant as well as to Mr. Salim Khan in the year 2013 itself.

4. After getting information about the receipt of Rs.2 crores each by the appellant as well as Mr. Salim Khan, the department initiated enquiry against both the recipient i.e. appellant and Mr. Khan considering the same under the definition of declared services u/s. 66E(e) of Finance Act, 1994. Appellant's statements were recorded on 17.1.2014 stating inter alia that he has not rendered any service to Reliance and aforesaid amount of Rs.2 crores was paid to him as *ex-gratia* although according to him the amount is the compensation towards the damages of copyright and moral rights done by the producers of *Zanjeer (2013)*. As per the appellant, despite that the department was insisting on payment of service tax and therefore the appellant *under protest* paid the amount of Rs.22,00,071/- as

service tax alongwith interest of Rs. 1,28,029/- on 31.1.2014 and requested for closure of proceedings vide letter dated 23.6.2014. The Commissioner, Service Tax, Mumbai-II accordingly passed order u/s. 80 ibid and waived penalty u/s. 76,77 & 78 ibid on the appellant and ordered closure of proceedings.

5. On the same set of facts another show cause notice dated 30.9.2015 was issued by the department to Mr. Salim Khan also for recovery of service tax of Rs.22,00,071/- alongwith interest of Rs.6,11,017/- on Rs.2 crores received by him from Reliance. He also paid the tax under protest. The said demand was confirmed by the Adjudicating Authority vide order-in-original dated 5.10.2016 and the amount paid *under protest* was appropriated. No penalty was imposed u/s. 76 & 77 ibid and penalty u/s. 78 ibid was reduced to 25%. On Appeal being filed by Mr. Khan, the Commissioner (Appeals) vide Order-in-Appeal dated 19.6.2017 allowed the appeal and held that the amount of Rs.2 crores received by the claimant can be considered as an *ex gratia* and not a payment for a consideration relating to any service. No Appeal was preferred by department and it attained finality. Mr. Khan thereafter filed refund application and the Deputy Commissioner (Refund), CGST & CX Mumbai (West) vide order dated 30.10.2017 sanctioned refund claim of Rs.27,44,905/- filed by Mr. Salim Khan u/s. 11B of the Central Excise Act, 1944 as made applicable to Service Tax matters u/s. 83, Finance Act, 1994.

6. Later on the appellant herein also filed the refund claim of Rs.23,28,100/- on 15.3.2018 on the ground that he had paid this amount *under protest* and as the amount paid by Mr. Salim Khan arising out of the same transaction has been held not liable for any

service tax, therefore the appellant is also entitled for the refund of the amount paid by him under protest. Accordingly the show cause notice dated 26.4.2018 was issued to the appellant as to why the refund claim be not rejected. The Adjudicating Authority vide Order-in-Original dated 7.6.2018 rejected the refund claim and observed that there was no payment of service tax '*under protest*' by the appellant. He distinguishes the case of Mr. Salim Khan by observing that in his case due process of adjudication under the law was followed, whereas in the present case the appellant has accepted his liability and proceedings were closed by the Commissioner, Service Tax, Mumbai-II vide order dated 9.7.2014 u/s. 80 ibid.

7. Aggrieved, the appellant filed appeal before the Commissioner (Appeals) and the learned Commissioner vide impugned order dated 6.12.2018 although specifically recorded a finding that the payment made by the appellant was not voluntary and since it was done out of compulsion therefore it is under protest, but still rejected the appeal filed by the appellant on the ground that the appellant has accepted his liability of Rs.23,28,100/- and the proceedings were closed by the Commissioner vide order dated 9.7.2014 u/s. 80 ibid and that order dated 9.7.2014 was not challenged further by the appellant before the appropriate forum before filing the refund claim. He also distinguishes the case of Mr. Salim Khan on the ground that in his case due process of adjudication under the law was followed.

8. According to learned counsel refund of amount deposited by Mr. Salim Khan (co-writer) was granted by the department considering it *ex gratia* whereas the same has been denied to the appellant despite knowing that it is part and parcel of the same

transaction. He further submits that the appellant and Mr.Salim Khan jointly received Rs.4 crores from Reliance as out of Court settlement in a suit filed by them jointly for copyright infringement before the Hon'ble High Court of Judicature at Bombay. Out of which they took Rs.2 crores each. The department considering the aforesaid amount for providing services to Reliance asked for services tax on the same from both of them separately. The main grievance of the appellant is that although the refund of the service tax paid by Mr.Salim Khan was granted to him whereas the service tax paid by the appellant has been denied to him on technical grounds despite a specific finding recorded by learned Commissioner that the said amount was paid by the appellant '*under protest*'. According to learned counsel the aforesaid differential treatment is without any intelligible differentia and is totally arbitrary. He further submits that it is also violative of Article 265, Constitution of India which specifically states that '*no tax shall be levied or collected except by authority of law*' and even if an amount is paid *under protest or under mistake of law* it does not take colour of tax. Per contra learned Authorised Representative reiterated the findings recorded in the impugned order and prayed for dismissal of appeal. According to him, the Appellant did not challenge the order dated 9.7.2014 before the appropriate forum and it attained finality, so no refund can be allowed and in support of his submissions, learned Authorised Representative cited case laws also.

9. I have heard rival submissions and perused the case records including the written submission alongwith case laws cited by the respective sides. Learned commissioner has recorded a specific

finding that the payment made by the appellant was not voluntary and is under protest and also that the application for refund is not barred by limitation. The aforesaid findings of the learned commissioner have not been challenged by the department and therefore it attained finality. As per the impugned order of learned Commissioner, tax has been collected in accordance with law i.e. under the enactment itself and no amount is refundable unless a refund can be claimed in terms of the statute/enactment. I am afraid I do not endorse the aforesaid view of the learned Commissioner. It is settled position that if the payment made by the assessee is not for any services rendered by him, the amount collected by Revenue as service tax is without authority of law and cannot be termed as tax even and can't be retained by them. Where there is no levy of service tax, amount wrongly paid cannot partake the character of 'service tax'. Had it been a tax then I would have understood the case of revenue but since in another case arising out of the same transaction it has been held not to be taxed since no service has been provided, then the amount paid by the appellant herein that too *under protest* cannot be termed as tax, but merely a deposit. If in the case of Salim Khan, it has been held by the adjudicating authority that since it is not in lieu of any service provided therefore no service tax is payable, then in the instant matter which also arises out of the same transaction, the department cannot keep the deposit under the head 'Service tax'. Wrong nomenclature has been given by the revenue to the deposit and on that premise department cannot be permitted to retain it. Retention of any amount paid without any liability or in excess of the liability

violates Article 265 of the Constitution of India. Therefore, the contention that the assessment in the case of the appellant has attained finality and hence, he cannot claim refund unless the assessment is challenged is misconceived and contrary to the law. 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 bears the heading "*Taxes not to be imposed save by authority of law*" and lays down that no tax shall be levied or collected except by authority of law. So the act of the authorities by keeping the deposit is directly in conflict with Article 265. When the amount deposited by the appellant is not a tax and merely a deposit, there is no question of applying the provisions of the Finance Act for its refund. In the decisions cited by learned Authorised Representative the issue was about the refund of duty whereas in the instant matter there is no issue about the refund of duty but it's all about refund of deposit which was deposited *under protest* by the appellant. In my view, refund provisions should be interpreted in a reasonable and practical manner and when warranted, liberally in favour of the assessee.

10. In view of the discussions made in the preceding paragraphs, the instant appeal filed by the appellant deserves to be allowed and the same is accordingly allowed with consequential relief, if any.

(Order pronounced in the open Court on 09.11.2021)

(Ajay Sharma)
Member (Judicial)