CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

EXCISE APPEAL No.41832 of 2016
EXCISE APPEAL No.41833 of 2016

[Arising out of Order-in-Appeal Nos.323 & 324/2016 (CXA-II) dt. 23.08.2016 passed by the Commissioner of Central Excise (Appeals-II), Chennai]

M/s.Sodecia India Ltd. **Appellant**
Tapalmedu, Pukkathurai,
Palamathur, Madhuranthakam Taluk,
Kancheepuram District 603 308.

Vs

The Commissioner of GST & Central Excise, **Respondent**
Chennai Outer Commissionerate,
Newry Towers, No.2054, I Block, II Avenue,
12th Main Road, Anna Nagar,
Chennai 600 040.

APPEARANCE:

Shri M.N. Bharathi, Advocate
Shri Jai Shankar, Advocate
For the Appellant

Ms. K. Komathi, Additional Commissioner (AR)
For the Respondent

CORAM:

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Date of Hearing : 15.12.2022
Date of Pronouncement: 20.12.2022

FINAL ORDER No. 40379-40380 / 2022

The issue in both these appeals being same and connected, they are heard together and disposed by this common order.

2. Brief facts of the case are that appellants are engaged in manufacture of MV parts and tools, implements of base metal and have also obtained service tax registration for discharging service tax as provider of services as well as recipient of services under reverse charge mechanism in respect of GTA, Legal services, Business Support Service, Works Contract Services etc. The appellant filed two refund claims for an amount of Rs.12,39,386/- and Rs.9,67,149/- for refund of service tax discharged by them on works contract services provided to them by M/s.SRC Projects Pvt. Ltd. and M/s.UR Ground Engineering Pvt. Ltd. The said companies undertook construction of some building activities and other civil structures for the appellant. It is the case of the appellant that they misunderstood the invoice details given by the service providers and discharged service tax liability on the balance 60% of the total amount charged for the services. They paid service tax on 31.03.2014. They later came to know that they need not pay 60% of the total consideration and that as the works of construction were in the nature of original works, the service provider has to pay only 40% of the entire consideration. Meanwhile, they had taken credit of the service tax paid by them on 29.04.2014, 22.05.2014 and 30.06.2014. During audit, it was pointed out to them that construction services are not eligible for cenvat credit and that they have to reverse the credit availed on the service tax paid by them for these services. Therefore, they reversed the credit on 28.02.2015. On coming to know that they are not liable to pay any amount of service tax on the construction services provided to them, they filed refund claims on

07.04.2015 for refund of the service tax paid by them under mistake. After due process of law, the original authority rejected the refund claim for an amount of Rs.12,39,386/- on the ground of limitation and unjust enrichment. With regard to refund claim for the amount of Rs.9,67,149/-, the original authority though sanctioned the refund, ordered the same to be credited to the Consumer Welfare Fund observing that the amount is hit by the doctrine of unjust enrichment. Against these orders of adjudication, the appellant filed appeals before the Commissioner (Appeals) who vide impugned order dated 23.08.2016 upheld the same. Hence these appeals.

3.1 Ld. Advocate Shri M.N.Bharathi and Advocate Shri Jai Shankar appeared for the appellants. Ld. Counsel adverted to Rule 2A of Service Tax (Determination of Value) Rules, 2006 which provides for determining the liability of service tax on works contract services, which reads as under :

"**RULE 2A. Determination of value of service portion in the execution of a works contract.** — Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely :-

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods or in goods and land or undivided share of land, as the case may be transferred in the execution of the said works contract.

Explanation. - For the purposes of this clause,-

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract;

(b) value of works contract service shall include, -

(i) labour charges for execution of the works;

(ii) amount paid to a sub-contractor for labour and services;

(iii) charges for planning, designing and architect's fees;

(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;

(v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;

(vi) cost of establishment of the contractor relatable to supply of labour and services;

(vii) other similar expenses relatable to supply of labour and services; and

(viii) profit earned by the service provider relatable to supply of labour and services;

(c) where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause;

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely :-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;…"

(emphasis supplied)

3.2 It is argued by the Counsel for the appellant that when the construction works are in the nature of original works, the service provider has to pay only service tax @ 40% of the consideration received by him. In the present case, the service provider being a limited company and not a partnership firm, proprietorship firm or Hindu Undivided Family, the service provider had issued invoices to the appellant collecting service tax @ 4.944% on the total consideration. The appellant mistook the said figure and paid service tax on the

balance 60% of the consideration. They were under the impression that the service provider has to pay 40% of service tax and the appellant being a service recipient has to pay balance 60% of service tax under reverse charge mechanism. Therefore, they had paid service tax on 60% of the total consideration directly to the Government.

3.3 Thereafter, the appellant availed cenvat credit of the service tax paid by them on various dates 29.04.2014, 22.05.2014, 30.06.2014. On being informed by the audit wing that service tax paid on construction works is not eligible for cenvat credit, the appellant immediately reversed the credit. They also came to understand that the construction work carried out being original works, they are not liable to pay service tax under reverse charge mechanism and only 40% of the consideration paid is liable to service tax. Thus, they filed refund claims on 07.04.2015. They had paid service tax on 31.03.2014. The department was of the view that as the last date for filing refund claims being 31.03.2015 (one year from the date of paying service tax), refund claims filed on 07.04.2015 are barred by limitation.

3.4 The Ld. Counsel submitted that, when the tax itself is paid by mistake, the limitation envisaged in Section 11B of Central Excise Act, 1944 would not apply. In support of this argument, Ld. Counsel relied upon the decision in the case of *3E Infotech* - 2018 (18) G.S.T.L. 410 (Mad.). It is further pointed out that the original authority had in fact accepted the contention of the appellant that the tax was paid under mistake and thereby refund claim in respect of Rs. 9,67,149/- was

sanctioned. However, the amount was ordered to be credited to the Consumer Welfare Fund holding that the appellant has not been able to prove that the incidence of tax has not been passed on to another.

3.5 Ld. Counsel also adverted to para 6.1 of OIO dt. 31.03.2015 to argue that the original authority has categorically held that the amount of Rs.12,39,386/- has been paid by the appellant by mistake. The amounts having been paid by mistake, the limitation envisaged in Section 11B would not apply and the appellant is eligible for refund.

3.6 Further in SCN No.5/2015 dated 12.06.2015 there is no allegation of limitation even though refund was filed beyond the time of one year. In SCN No.4/2015 dt. 12.6.2015, the ground alleged for rejection of refund is that the appellant has not passed the test of unjust enrichment. It is argued by the Ld. Counsel that tax having been paid under reverse charge mechanism, there is no possibility of passing on the incidence of tax. The authorities below have wrongly held that the service provided being in the nature of construction of building, the same goes into the capital assets of the appellant and therefore the incidence of tax has to be construed to be passed on to the customer. To counter this, Ld. Counsel relied upon the decision in the case of *Sunrise Spices Ltd. Vs CCE& ST Jaipur* - 2019 (4) TMI CESTAT Chennai and *Gurnani Infra Developers Pvt. Ltd. Vs CGST Jaipur* - 2020 (37) G.S.T.L 318 (Tri.-Del.) to argue that when the service tax is paid by mistake under reverse charge mechanism, the issue of unjust enrichment does not arise. It is also submitted by the counsel

that they had produced Chartered Accountant certificate to show that the amount was reflected in the balance sheet as 'receivables' and not as 'expenditure'. The Chartered Accountant certificate would establish that the incidence of tax has not been passed on to the customer. He prayed that the appeals may be allowed.

4.1 Ld. A.R Ms. K. Komathi appeared for the Department. She supported the findings in the impugned order. Ld. A.R adverted to para-11 of the order passed by Commissioner (Appeals) which reads as under :

> "11. The Appellant being a manufacturer of excisable goods had received the services of construction and had also consumed the same and hence the expenditure incurred towards such service being consumed by them would automatically get loaded on to the finished goods of the Appellant unless the contrary is proved by them. The Apex Court in the case of CCE, Chennai-III vs Grasim Industries [2015 (318) ELT 594 (SC)] had stated that in so far as the cost of production is concerned, it may include capital goods which are a part of fixed cost as well as raw materials which are a part of variable cost and both the components come into costing of a particular product. Applying the legality involved in the decision rendered by the Hon'ble Apex Court, the services consumed by the Appellant during the course of manufacture of their products should be treated as a part of the cost of the final products. In the instant case the Respondent in the Impugned Order has stated that the Appellant had failed to satisfactorily prove that the tax paid by mistake in connection with the construction service had not been considered as a part of their production overhead/factory overhead/manufacturing overhead under the cost accounting standards. Therefore without such explicit evidences, a mere certificate from a Chartered Accountant alone would not suffice to prove that the Appellant had crossed the bar of unjust enrichment as rightly held by the Respondent. Hence the two claims in dispute are hit by the bar of unjust enrichment."

4.2 It is argued by her that the appellant having availed services for construction of building, the tax paid goes into the capital assets and becomes included in the costing of the finished products manufactured by them. That therefore the incidence of tax has been passed on.

Though the appellant has produced Chartered Accountant certificate they have not produced Balance Sheet to prove that the amount has been maintained as 'receivable' in their balance sheet. The decision in the case of *Rajasthan Spinning & Weaving Mills Ltd. Vs CCE Jaipur* - 2006 (194) E.L.T 254 (Tri.-Del.) was relied by Ld. A.R to argue that it is not sufficient to merely furnish Chartered Accountant certificate to prove that the incidence of duty has not been passed to another. When the balance sheet and other related documents are not produced by the appellant, the Chartered Accountant certificate solely cannot be relied. She prayed that appeals may be dismissed.

5. Heard both sides.

6. The refund claims have been rejected on two grounds firstly, on the ground of limitation and secondly on the ground of unjust enrichment.

7. The contention of the appellant is that the tax having been paid under mistake, the period of limitation as envisaged in Section 11B will not apply. Interestingly, it has to be noted that the adjudicating authority as per OIO No.34/2015 dt. 30.09.2015 has held that tax has indeed been paid by mistake by the appellant. The adjudicating authority has even sanctioned the refund. However, the amount was ordered to be credited to the Consumer Welfare Fund on the issue of unjust enrichment. In the OIO No.33/2015 dt. 31.08.2015 which is in respect of the refund of Rs.12,39,386/-, it can be noted that there is

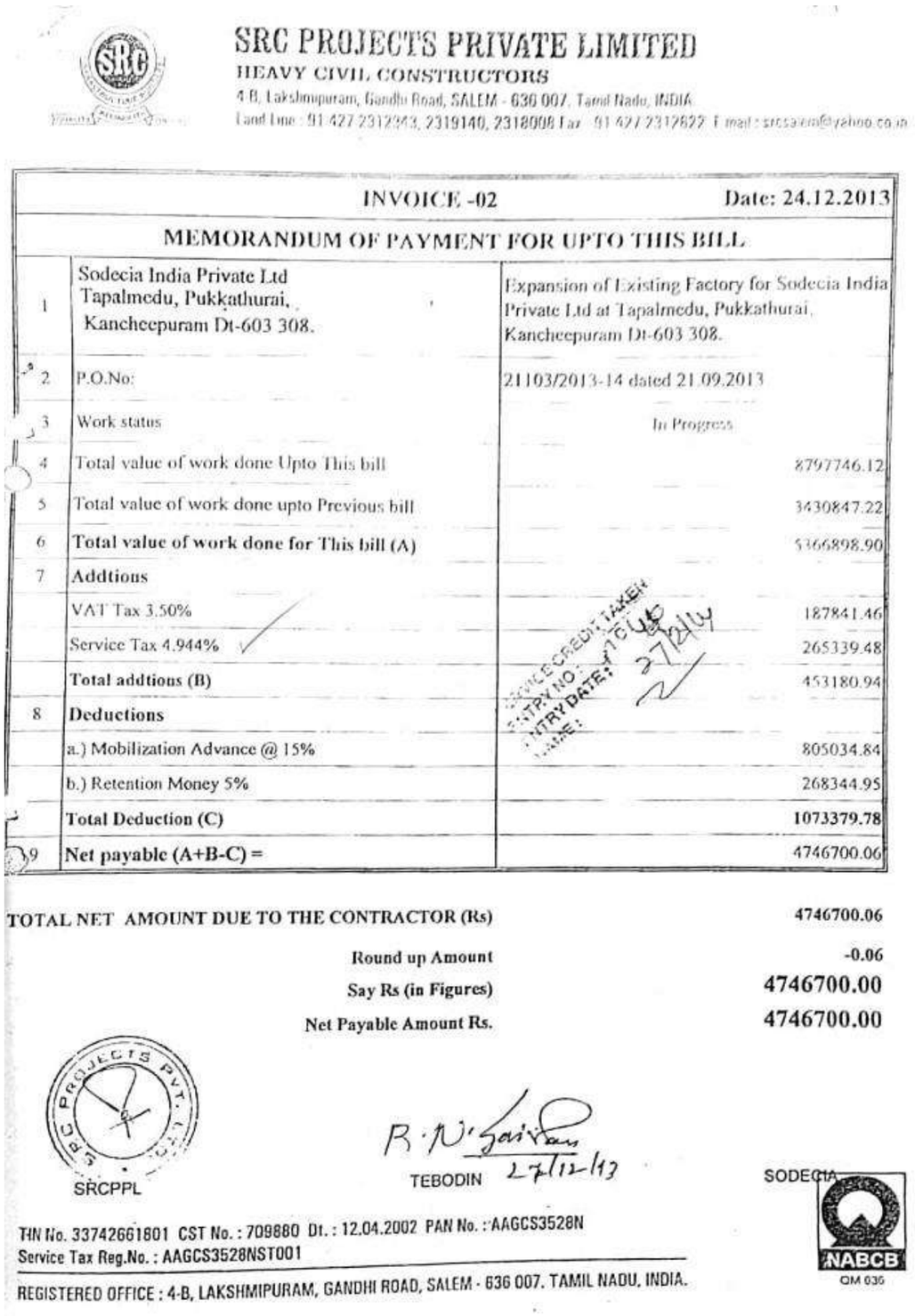
detailed discussion with regard to the issue whether the appellant has paid tax under mistake. In para 6.1 the original authority has held as under :

> "6.1…. The tax in question is claimed to have been paid for the receipt of the civil construction service under 'works contract' mechanism and the service provider being a limited company it is the service provider who is supposed to pay appropriate service tax in full but the assessee has misconstrued the rate of 4.944% adopted by the service provider for payment of service tax as service provider's liability (40% of total liability) and the balance 60% of liability @7.416% is their own liability as service receiver and they have accordingly paid the service tax. Thus the fact of the matter is that the assessee has paid the impugned amount of 12,39,386/- by mistake as their liability of service tax. After coming to know that there is no liability of service tax on their part as a limited company for the receipt of the construction service under works contract they have filed the present claim for refund of the service tax paid by them by mistake. Now the questions that are required to be answered are whether their claim for refund satisfies all the substantive and procedural conditions prescribed under section 11B of the Central Excise Act, 1944 to allow their claim for refund……."

From the above, it can be seen that there is an observation by the original authority in both the orders that the tax has been paid by mistake. However, the Commissioner (Appeals) in para-7 has summarily held that refund claim is hit by limitation without discussing the aspect whether the tax amount has been paid by mistake.

8. In the present case, it has to be noted that as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, the extract of which has already been reproduced in para 3.1 above; in the case of works contracts which is in the nature of original works, the service provider has to pay only on 40% of the total amount charged for the works contract. The levy of service tax on such works is 40% of the total amount and has to be paid by the service provider only. The service

provider had correctly issued invoices collecting service tax @ 40% on the consideration received by them. It is clear from the invoice, a scanned copy of which is reproduced as under :



SRC PROJECTS PRIVATE LIMITED
HEAVY CIVIL CONSTRUCTORS
4-B, Lakshmipuram, Gandhi Road, SALEM - 636 007. Tamil Nadu, INDIA
Land Line : 91 427 2312343, 2319140, 2318008 Fax : 91 427 2312622 E mail : srcsalem@yahoo.co.in

INVOICE -02 Date: 24.12.2013

MEMORANDUM OF PAYMENT FOR UPTO THIS BILL

1	Sodecia India Private Ltd Tapalmedu, Pukkathurai, Kancheepuram Dt-603 308.	Expansion of Existing Factory for Sodecia India Private Ltd at Tapalmedu, Pukkathurai, Kancheepuram Dt-603 308.
2	P.O.No:	21103/2013-14 dated 21.09.2013
3	Work status	In Progress
4	Total value of work done Upto This bill	8797746.12
5	Total value of work done upto Previous bill	3430847.22
6	**Total value of work done for This bill (A)**	5366898.90
7	**Addtions**	
	VAT Tax 3.50%	187841.46
	Service Tax 4.944%	265339.48
	Total addtions (B)	453180.94
8	**Deductions**	
	a.) Mobilization Advance @ 15%	805034.84
	b.) Retention Money 5%	268344.95
	Total Deduction (C)	**1073379.78**
9	**Net payable (A+B-C) =**	4746700.06

SERVICE CREDIT TAKEN ENTRY NO: 1C46 ENTRY DATE: 27/2/14 NAME:

TOTAL NET AMOUNT DUE TO THE CONTRACTOR (Rs) **4746700.06**

Round up Amount **-0.06**

Say Rs (in Figures) **4746700.00**

Net Payable Amount Rs. **4746700.00**

SRC PROJECTS PVT. LTD. SALEM SRCPPL

R. N. Gaitan 27/12/13
TEBODIN

SODECIA

NABCB QM 636

TIN No. 33742661801 CST No. : 709880 Dt. : 12.04.2002 PAN No. : AAGCS3528N
Service Tax Reg.No. : AAGCS3528NST001

REGISTERED OFFICE : 4-B, LAKSHMIPURAM, GANDHI ROAD, SALEM - 636 007. TAMIL NADU, INDIA.

In the above invoice, Sl.No.7 shows that service tax has been collected from the appellant @ 4.944% of the total amount charged which comes to Rs.2,65,339.48. It is the case of the appellant that as the invoice showed only collection of tax on 40% of the consideration paid by them, they were under the impression that they have to pay service tax for the balance 60% of the consideration. Thus they paid tax on the balance 60% as their own liability. This has been clearly discussed by the original authority in para 6.1 of the order No.33/2015 dt. 31.08.2015. I have to say that it is clearly brought out from evidence that appellant has paid the tax by mistake. Moreover, the original authority vide OIO No.34/2015 dt. 30.09.2015 has held that limitation will not apply as the tax has been paid by mistake. Taking note of these facts, I hold that tax has been paid by mistake by the appellant. The Hon'ble jurisdictional High Court in the case of *3E Infotech* (supra) has held that when tax has been paid by mistake, the limitation envisaged in Section 11B will not apply. The relevant paras are reproduced as under :

> **"11.** A similar view has been taken by the Bombay High Court in the case of *Parijat Construction* v. *Commissioner Excise, Nashik*, reported in 2018 (359) E.L.T. 113 (Bom.), where the Bombay High Court has held as under :-
>
> > 4. 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.

> 5. 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. 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. 8,99,9621/- 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.

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.

15. This Civil Miscellaneous Appeal is ordered accordingly. There shall be no order as to costs."

After appreciating the facts and following the decision (supra), I hold that rejection of refund claim on the ground of limitation is not sustainable.

9. The second ground of rejection of refund is that the amount paid is hit by the doctrine of unjust enrichment. The argument of the Ld. Counsel for the appellant is that when tax is paid under reverse charge mechanism there is no occasion for passing on the incidence of tax to the customer. Section 11B of Central Excise Act, 1944 deals with claim for refund of duty and interest, if any, paid on such duty. Section 83 of the Finance Act, 1994 makes certain provisions of Central Excise Act, 1944 applicable to service tax also. As per Section 83, the provisions dealing with refund (Section 11B, 11BB, 11C, 12,12A, 12B, 12C, 12D) are applicable to service tax. As per sub-section (1) of Section 11B any person who has paid the duty / tax can make an application for refund, along with documents to show that the incidence of such duty/interest/tax paid by him or collected from him has not been passed on to any other person.

10. Chapter II-A of Central Excise Act, 1944 provides for as to how the tax has to be collected. Section 12A of this chapter, makes it mandatory to mention the duty/tax in the invoice or like documents when goods are sold / when services are provided. Section 12B speaks about the rebuttable presumption when duty on goods has been paid under the Act ibid. These sections are reproduced below :

> **"SECTION 12A. Price of goods to indicate the amount of duty paid thereon.** — Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.
>
> **SECTION 12B. Presumption that the incidence of duty has been passed on to the buyer**. — Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."

11. In the instant case, the disputed tax has been paid by the service recipient. He has paid it directly and has neither collected the amount nor issued any invoice. Further, when the amount of tax is held to be paid under a mistake, it cannot be said that the tax was paid under the Finance Act, 1994. It was an amount which was paid without having a liability to pay. There was no authority of law to collect such amount from the appellant.

12. The Ld. A.R has strongly argued that as the work contract services were availed for constructing building / civil structure which is used in manufacture of finished goods, the amount must be considered to be factored in the cost of production. That therefore the incidence of tax has been passed on. The decision in the case of *Grasim Industries* (supra) does not apply to the facts of this case, as in the said case, capital goods were imported by manufacturer who used these goods for manufacture of finished products. The duty paid on capital goods on import was sought by the manufacturer to be

refunded. When there is no liability to pay tax under the Finance Act, 1944 and the amount is not mentioned as tax in any invoice or like document, the amount paid cannot be considered to have the character of tax. The amount paid falls outside the purview of the enactment as discussed in para-10 of the judgement in the case of *3E Infotech* (supra) wherein the Hon'ble High Court has relied on the judgment passed by Hon'ble Gujarat High Court.

13. Moreover, in the present case, the appellant has furnished the Chartered Accountant certificate. In page 132 and 133 of appeal paper book the appellant has enclosed the copy of this certificate. The Ld. A.R has relied upon the decision in the case of *Rajasthan Spinning Mills Ltd.* (supra) to contend that such certificate cannot be solely relied to establish that the incidence of duty has not been passed on. In the present case, there is no levy of tax on the balance 60% of the consideration. There is no invoice issued by appellant mentioning the amount as tax and they have paid from their own pocket. In the case of *3E Infotech*, the Hon'ble jurisdictional High Court relied on the decision in the case of *Oil and Natural Gas Corporation Ltd. Vs Union of India* reported in 2017 (354) ELT 577 (Guj.). In *Joshi Technologies International INC India Projects Vs UOI* – 2016 (339) ELT 21 (Guj.) observed as under :

> "….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."

14. In the case on hand, the department does not dispute the veracity of the certificate, but merely denies the refund stating that appellant has to produce further documents. The Chartered Accountant who has issued the certificate has stated that he has examined the statutory records of the assessee-appellant. Taking into consideration, that the amount was paid by mistake, an no invoice was issued, I am of the view, that rejecting the said certificate in toto so as to hold that the incidence of duty has been passed on cannot be legally sustained. In the result, I hold that the appellant has succeeded in establishing that the amount is not hit by the doctrine of unjust enrichment. The appellant is eligible for refund.

15. In the result, the impugned order is set aside. The appeals are allowed with consequential reliefs, if any.

(Pronounced in open court on 20.12.2022)

Sd/-
(**SULEKHA BEEVI C.S.**)
MEMBER (JUDICIAL)

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