Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO. 3

Service Tax Appeal No. 486 of 2011-DB

(Arising out of OIA-113/2011/STC/KANPAZHAKAN/COMMR-A-/AHD dated 16/05/2011 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD)

C.S.T.-Service Tax - Ahmedabad **.....Appellant**
7 th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi,
Ahmedabad, Gujarat - 380015

VERSUS

Bharat Sanchar Nigam Ltd **...Respondent**
Ahmedabad Telecom District,
Ahmedabad, Gujarat

APPEARANCE:
Shri Ghanasyam Soni, Additional Commissioner (AR) for the Appellant
Shri Nitesh Parmar, Chartered Accountant for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C.L.MAHAR

Final Order No. A/ 11616 /2023

DATE OF HEARING: 11.04.2023
DATE OF DECISION: 26.07.2023

C.L. MAHAR

The brief facts of the mater are that M/s. BSNL are engaged in providing taxable services under the category of Telephone Service and holding a valid service tax registration with the department. The respondent filed a refund claim of Rs 2,37,13,418 on 09.02.2009 pertaining to the amount of service tax deposited by them vide TR-6 challan No 13/2002 -2003 dated 31.03.2003 pertaining to period August 1995 to March 1997 and April 1997 to December 2001 in pursuance to this Tribunal Order No. A/2629/WZB/AHD/08 dated 01.12.2008. It will be relevant here to mention the background of the deposit. The department on issuing two show cause notices to the respondent assessee namely M/s. BSNL dated 10.09.2002 and dated 24.03.2003 wherein the short payment of service tax amounting to Rs. 3.36 Crores has been alleged.

2. The above referred two show cause notices were confirmed by the Adjudicating Authority against which the respondent assessee M/s. BSNL made an appeal before the Commissioner (Appeals) which also failed. The respondent assessee made an appeal before this Tribunal against the order of the Commissioner (Appeals) and in the stay order No. S/492/WZB/AHD/2008 dated 27.05.2008, this Tribunal observed that since out of the total confirmed demand of Rs. 3.36 Crores, the respondent assessee has already deposited an amount of Rs. 2.27 Crores during the process of enquiry by the department and before issuing the above mentioned two show cause notices. The CESTAT treated this amount of Rs. 2.27 Crores as deposit. This Tribunal vide its Final Order No. A/2629/WZB/AHD/08 dated 01.12.2008 set aside the above order in appeal and thus the demand of service tax amounting to Rs. 3.36 Crores was also set aside and it was ordered that appellant will be entitled for the consequential relief.

3. The original sanctioning authority namely Assistant Commissioner Service Tax, Ahmedabad, sanctioned the refund of the deposited amount done by the respondent assessee viz. BSNL vide its order dated 08.09.2010. The department feeling aggrieved with the Assistant Commissioner's order made an appeal before the Commissioner (Appeals) who vide its order No. V2(ST)RA/02/A-IV/2011 dated 24.05.2010 rejected the department appeal, observing the following:-

> *"In the grounds of appeal, the appellant contended that the adjudicating authority came to the conclusion that unjust enrichment is not applicable without verifying the corresponding invoices. In this record I find that the respondents have not raised any supplementary Invoice to all the customers to collect this amount paid subsequently. During the nearing the respondents produced some sample copies of Invoices raised subsequent to the period of payment which does not indicate collection of any separate amount. So, the record does not indicate collection of the amount paid from the customers.*
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> *The other ground raised by the appellant in the grounds of appeal is that the adjudicating authority has not verified the certificate Issued by the Chartered Accountant to find out whether the certificate is in*

conformity which the Balance Sheet or Profit and Loss Account. In this record, the respondents have informed that there is no separate Balance Sheet or Profit and Loss Account prepared for Ahmedabad Telecom District. The consolidated Balance sheet or Profit and Loss Account does not throw any light regarding the accounting of 2.37 Crores paid as deposit. The only register wherein there is an indication about the payment of 2.37 Crores in the J.S. Register. As per the register this amount of 2.37 Crores has been shown as past period expenditure. This expenditure has been debited and credit of equal amount has been given to Service Tax payable. This shows that the expenditure incurred has been borne by themselves by reducing their profit and this expenditure has not been passed on to the customers. Thus the J. S. Register along with the certificate issued by the Chartered Accountant clearly state that the expenditure has been borne by the respondents and not passed on to the customers and hence unjust enrichment is not applicable in this case. On this issue Hon'ble Tribunal has given its observation in the case of Thales E-Transaction CGS v/s CCE, New Delhi in 2006 (3) STR 205 (Tri.Del). In this case Hon'ble Tribunal held that if the assessee is able to show by way of a CA's certification from the customer that the incident of service tax has not been passed, then they are eligible for refund and in the case of CCE Jaipur-I Vs Laxmi Finance Co. in 2006 (3) STR 25 (Tri.-Del) Hon'ble Tribunal has held that non passing of incidence of tax can be verified with reference to records of certification of Chartered Accountant. In the present case the entry in the J.S register along with Chartered Accountant certificate proves that unjust enrichment is not applicable."

4. The department feeling aggrieved by the Commissioner (Appeals) order, reviewed the same and are before us in appeal.

5. We have heard both sides. We feel that following three questions need to be answered by us in this regard.

(i) Whether the amount of Rs. 2.37 crores deposited by the Respondent assessee M/s. BSNL before issuing the show cause notice towards the alleged short payment of the service tax which was also considered as pre-deposit at the time of admission of the appeal by this Tribunal.

(ii) Whether the principle of unjust enrichment are present in this particular matter or not.

5.1 It is a matter of record that M/s. BSNL deposited Rs. 2.37 crores with the Revenue during the course of inquiry for the alleged short payment of service tax. Subsequently, the matter got adjudicated and finally this Tribunal has decided that there is no short payment of service tax on the

part of the respondent assessee and therefore as of today there is no demand against the respondent assesse with regard to the alleged two show cause notices which was subject matter of litigation in this regard. The amount which was deposited has also been taken as pre-deposit at the time of the admission of the appeal of the Respondent and it is a settled principle of law now that deposit taken during the course of investigation or as a pre-deposit at the time of the admission of the appeal will not be hit by the provision of the Section 11 B of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. In this regard we rely on the judgment of Allahabad High Court in the case of Ebiz .Com Pvt Ltd - 2017(49) STR 389 (All.)

> ***"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.*
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> ***20.****If an amount is paid by an assessee, in duty of excise, pursuant to a liability created under a Statute or by statutory order, passed by competent authority, and such demand is later found illegal, Section 11AB contemplates that amount received shall be refunded to assessee provided that the incidence of such duty had not been passed on by him to any other person.*
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> ***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.*
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> ***22.****In Commissioner of Central Excise, Coimbatore v. Pricol Ltd. - 2015 (39) S.T.R. 190 (Mad.) = 2015 (320) E.L.T. 703 (Mad.) of Division Bench of Madras High Court had an occasion to look into a similar dispute. Therein also payment was made during investigation by Assessee. Subsequently, show cause notice was issued and Assessing Officer passed order adjudicating liability of Central Excise and amount deposited by Assessee was appropriated against such determined liability. Subsequently, in appeal, assessment order was set aside and question of refund arose. An argument was raised that unless Assessee proves that he has not passed on incidence of duty to any other person, refund cannot be allowed. Court held, it is not a case of refund of duty but return of pre-deposit made by Assessee at the time of investigation under protest. Similarly in the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at the time of investigation, as has been recorded in original proceedings itself. Court has said as under :-*

"There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee."

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.*

24.*Madras High Court in Commissioner of Central Excise v. Pricol Ltd. (supra) relied on a Bombay High Court's judgment in Suvidhe Ltd. v. Union of India - 1996 (82) E.L.T. 177 (Bom.); Gujarat High Court's judgments in Commissioner of Customs v. Mahalaxmi Exports - 2010 (258) E.L.T. 217; Parle International Ltd. v. Union of India - 2001 (127) E.L.T. 329 (Guj.) and this Court's judgment in Summerking Electricals (P) Ltd. v. CEGAT - 1998 (102) E.L.T. 522 (All.).*

25.*Against the judgment of Bombay High Court in Suvidhe Ltd. (supra), Revenue preferred an appeal before Supreme Court but High Court's view was maintained. The said judgment is reported in Union of India v. Suvidhe Ltd. - 1997 (94) E.L.T. A159 (S.C.).*

26.*We are also informed that following the judgment in Suvidhe Ltd. (supra), Central Board of Excise and Customs (hereinafter referred to as 'C.B.E. & C.') issued Circular No. 275/37/2000-CX.8A, dated 2-1-2002 providing as under :-*

It would be pertinent to mention that the Revenue had recently filed a Special Leave Petition against Mumbai High Court's order in the matter of "2. NELCO LTD., challenging the grant of interest on delayed refund of pre-deposit as to whether :

(i) the High Court is right in granting interest to the depositor since the law contained in Section 35F of the Act does in no way provide for any type of compensation in the event of an appellant finally succeeding in the appeal, and

(ii) the refunds so claimed are covered under the provisions of Section 11B of the Act and are governed by the parameters applicable to the claim of refund of duty as the amount is deposited under Section 35F of the Central Excise Act, 1944.

The Hon'ble Supreme Court vide its order dated 26-11-2001 dismissed the appeal. Even though the Apex Court did not spell out the reasons for dismissal, it can well be constructed in the light of its earlier judgment in the case of Suvidhe Ltd. and Mahavir Aluminium that the law relating to refund of pre-deposit has become final.

In order to attain uniformity and to regulate such refunds it is clarified that refund applications under Section 11B(1) of the Central Excise Act, 1944 or under Section 27(1) of the Customs Act, 1962 need not be insisted upon. 3. A simple letter from the person who has made such deposit, requesting the return of the amount, along with an attested Xerox copy of the order-in-appeal or CEGAT order consequent to which the deposit made becomes returnable and an attested Xerox copy of the Challan in Form TR6 evidencing the payment of the amount of such deposit, addressed to the concerned Assistant/Deputy Commissioner of Central Excise or Customs, as the case may be, will suffice for the purpose. All pending refund applications already made under the relevant

provisions of the Indirect Tax enactments for return of such deposits and which are pending with the authorities will also be treated as simple letters asking for return of the deposits, and will be processed as such. Similarly, bank guarantees executed in lieu of cash deposits shall also be returned."

27.*Circular dated 2-1-2002 has been modified by subsequent Circular dated 20-6-2003 to the following effect :-*

"It has been brought to the notice of the Board that the wordings in para 4 of the Circular, namely, "any deviation and resultant liability to interest on delayed refunds shall be viewed strictly" convey the impression that interest is liable to be granted for refund of pre-deposits even when there is no corresponding provision in the Central Excise Act, 1944. The mater has been examined and the sentence is re-worded as under :-

"Any deviation from the procedure explained hereinabove shall be viewed strictly."

28.*There is one more Circular No. 802/35/2004-CX, dated 8-12-2004 which provides that against an order whereunder refund is admissible to an assessee with regard to the pre-deposit, if an appeal is pending, that shall not be taken as justification for denying refund.*

29.*The question of interest on delayed deposit or refund pre-deposit came to be considered by Supreme Court in Commissioner of Central Excise, Hyderabad v. I.T.C. Ltd. - 2005 (179) E.L.T. 15 (S.C.). A statement was made on behalf of the Central Board of Excise and Customs by the Solicitor General of India that Board proposes to issue a circular in connection with the payment on all such pre-deposits. A draft copy of the circular was also handed over to the Supreme Court. In view thereof, Supreme Court decided the appeal holding as under :-*

"Having regard to the contents of the draft circular we direct compliance with the final order impugned before us and payment of interest in terms of the draft circular. The draft circular shall be appended to and the contents form part of this order. The appeal is disposed of. In view of this order any judgment of any High Court holding to the contrary will no longer be good law."

30.*Supreme Court in the aforesaid order allowed interest at the rate of 12% per annum.*

31.*Then we come on the question of interest on refund. In this regard, we find that a Division Bench of Delhi High Court in Surinder Singh v. Union of India - 2006 (204) E.L.T. 534 (Del.) relying on Supreme Court's judgment in Prince Khadi Woollen Handloom Producers Co-operative Indl. Society v. CCE - 1996 (88) E.L.T. 637 (S.C.), said that State, if has wrongly collected a tax from a person, and, even if there is no specific provision, still is liable to refund tax along with interest. Similar view was taken in Kuil Fireworks v. CCE - 1997 (95) E.L.T. 3 (S.C.) and CCE, Hyderabad v. ITC - 2005 (179) E.L.T. 15 (S.C.).*

32.*Recently also in Union of India v. Tata SSL Ltd. - 2007 (218) E.L.T. 493 (S.C.), Court held that pre-deposit is refundable along with interest and for that purpose, relied on its decision in Commissioner of Central Excise, Hyderabad v. I.T.C. Ltd. (supra) and Central Board of Excise and Customs' Circular dated 8-12-2004.*

33.*In a recent judgment of Gujarat High Court in Hindustan Coca-Cola Beverages Pvt. Ltd. v. UOI - 2015 (324) E.L.T. 299 (Guj.), an argument was raised, if there is no provision for payment of interest, the same shall not be payable. Court in Paras 5.4 and 6 said as under :-*

The "5.4 contention to the effect that no interest is payable because there is no provision of interest under the scheme of the Act is also thoroughly misconceived and misplaced. When the Department acts illegally and not as per the scheme of the Act, the interest on such refund can never be provided for under the Scheme of the Act. If the authorities act as per the law, the question of granting interest on refund can be appreciated and considered as per the scheme of the Act.

6.Learned Senior Advocate for the petitioner cited various judgments in support of his contention that even in absence of any statutory provision, interest on refund is automatic and has to be granted on commercial principles. The Court finds force in the contentions of the learned Senior Advocate for the petitioner. The learned counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of Sandvik Asia Ltd. v. Commissioner of Income-tax, Pune (supra), wherein the Hon'ble Apex Court even while finding that there was no statutory provision to pay interest on delayed payment of interest, held the assessee entitled to the same on general principles and found that the assessee would be entitled to be compensated by way of interest on interest. It was further pointed out by the learned Senior Advocate for the petitioner that the decision of the Hon'ble Supreme Court in the Sandvik Asia Ltd. v. Commissioner of Income-tax, Pune (supra), has been referred to a Larger Bench in the case of Commissioner of Income-tax, Gujarat v. Gujarat Flouro Chemicals, (2012) ITR 319 (SC). The said decision is neither stayed nor suspended and therefore, continues to hold the field. Moreover, the said decision is doubted with respect to the issue whether interest is payable by the Revenue to the assessee if the aggregate of instalments of Advance tax/TDS paid exceeds the assessed tax. Therefore, a doubt is cast only in respect of the finding which is in context with Section 214 and Section 244 of the Income-tax Act, 1961 and not with regard to grant of interest as compensation to the party who has been wrongfully deprived of the use of its money by an illegal retention of the same by the authority. Therefore, the said decision will continue to hold good in respect of refund cases, on equitable considerations, where any amount is wrongfully withheld from an assessee without authority of law."

34.*We may also refer here on a Division Bench's judgment of Karnataka High Court in Commissioner of Central Excise v. KVR Construction - 2012 (50) VST 469 = 2012 (26) S.T.R. 195 (Kar.), wherein construing Section 11B, Court said that it refers to claim for refund of duty of excise only and does not refer to any other amount collected without authority of law. That was a case of 'Service Tax' and Court said as under :-*

"Though under Finance Act, 1994 such service tax was payable by virtue of notification, they were not liable to pay, as there was exemption to pay such tax because of the nature of the institution for which they have made construction and rendered services. In other words, if the respondent had not paid those amounts, the authority could not have demanded the petitioner to make such payment. In other words, authority lacked authority to leavey and collect such service tax. In case, the department were to demand such payments, petitioner could have challenged it as unconstitutional and without authority of law. If we look at the converse, we find mere payment of amount, would not authorize the department to regularize such payment. When once the department had no authority to demand service tax from the respondent because of its circular dated 17-9-2004, the payment made by the respondent company would not partake the character of "service tax" liable to be paid by them. Therefore, mere payment made by the respondent will neither validate the nature of payment nor the nature of transaction. In other words, mere payment of amount would not make it a "service tax" payable by them. When once there is lack of authority to demand "service tax" from the respondent company, the department lacks authority to levey and collect such amount. Therefore, it would go beyond

their purview to collect such amount. When once there is lack of authority to collect such service tax by the appellant, it would not give them the authority to retain the amount paid by the petitioner, which was initially not payable by them. Therefore, mere nomenclature will not be an embargo on the right of the petitioner to demand refund of payment made by them under mistaken notion."

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".*

5.2 Otherwise also, we find that element of unjust enrichment in this particular case are not present. The amount of Rs. 2.37 Crores deposited by the assessee with the revenue, they could not have been passed by respondent assessee to its customers. Firstly as the charges of telephone/mobile phones which are charged by BSNL from its customers cannot be changed on the discretionary basis, at the same time the department has not established that the respondent assessee have issued any supplementary invoices of the above mentioned amount to their customers. We are also of the view that since the rate of the BSNL for telephone/mobile phone are pre-determined and therefore the expenditure incurred later on by the respondent assessee cannot be directly be passed on to the customers by any chance.

5.2 We also take note of the fact that the chartered accountant of the respondent assessee has certified that incidence of amount of Rs. 2.37 Crores deposited by M/s. BSNL has not been passed on by them to their customers.

5.3 In view of above we are of the view that the element of unjust enrichment in this particular case are not present and we are therefore find that respondent assessee is entitled for refund of the deposit which was made them during the course of inquiry and which was further taken as pre-deposit by this Tribunal while admission of their appeals.

6. In view of the above we hold that we do not find any legal lacuna in the order in appeal which is under challenge before us and therefore we uphold the same and set aside the appeal.

(Pronounced in the open court on 26.07.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

C.L.MAHAR
MEMBER (TECHNICAL)