

In The Customs, Excise & Service Tax Appellate Tribunal

West Zonal Bench At Ahmedabad

Appeal No.ST/13975/2013-SM

Arising out of OIA No.SRP/139/DMN/2013-14, dt.29.07.2013 passed by Commissioner of Central Excise & Customs (Appeals), Vapi

M/s Metro Motors

Appellant

Vs

CCE Daman

Respondent

Represented by:

For Appellant: Shri Jigar Shah, Adv.

For Respondent: Shri G.P. Thomas, A.R.

For approval and signature:

Mr. P.K. Das, Hon^{ble} Member (Judicial)

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? No

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3. Whether their Lordships wish to see the fair copy of the order? Seen
4. Whether order is to be circulated to the Departmental authorities? Yes

CORAM:

MR. P.K. DAS, HON'BLE MEMBER (JUDICIAL)

Date of Hearing/Decision:02.01.15

Order No. A/10003 / 2015, dt.02.01.2015

Per: P.K. Das

1. The relevant facts of the case, in brief, are that the appellant is authorized dealer of M/s Hero Honda Motors Ltd. They are registered with the Service Tax authorities. It was found that the appellants were engaged in providing services as Direct Selling Agents of various banks including ICICI Bank in their premises. According to the Revenue, the appellant was liable to pay Service Tax under the category of Business Auxiliary Service. During the investigation, the appellant at the instance of the visiting officers, deposited an amount of Rs. 6,85,200.00 through TR-6 challan dt. 19.09.2005. A show cause notice dt. 25.09.2008 was issued proposing demand of Service Tax of Rs. 6,07,032.00 under the category of Business Auxiliary Service for the period 01.07.2003 to 27.08.2005. It was also proposed to appropriate the amount deposited by them along with interest during the investigation. The adjudicating authority confirmed the demand of duty along with interest and penalties. The Commissioner (Appeals) modified the adjudication order to the extent the demand of Service Tax was reduced to Rs. 4,43,192.00. He has also appropriated the said amount along with interest and penalty against the deposit made by the appellant. The Revenue challenged this order of Commissioner (Appeals) before the Tribunal. The appellant has also filed a cross objection against the appeal of the Revenue. The Tribunal vide Final Order No.A/1355-1356/WZB/AHD/2011, dt.28.07.2011 rejected the appeal filed by Revenue and the cross objection filed by the appellant was allowed by setting aside the penalty imposed under Section 77 & 78 of the Finance Act, 1994. Thereafter, the appellant filed a refund

claim of Rs.2,66,907.00 as deposited by them during the investigation. The adjudicating authority sanctioned and paid a refund of Rs.2,66,907.00. Revenue filed appeal before the Commissioner (Appeals). By the impugned order, the Commissioner (Appeals) set aside the Adjudication order and Department's appeal was allowed. Hence, the appellant filed this appeal.

2. Ld. Advocate on behalf of the appellant submits that the appellant deposited this amount during investigation. They have not paid any Service Tax and therefore Section 11B of Central Excise Act 1944 would not be applicable. He relied upon the decision of the Tribunal in the case of Bajaj Auto Ltd Vs CCE Aurangabad - 2007 (6) STR 356 (Tri-Mum) and M/s Foods, Fats & Fertilizers Ltd Vs CCE Guntur - 2010 (20) STR 482 (Tri-Bang). He further submits that Hon'ble Supreme Court in the case of Union of India Vs Suvidhe Ltd - 1997 (94) ELT A-159 (SC) dismissed the appeal filed by the Revenue on the identical issue.

3. Learned Authorised Representative on behalf of the Revenue reiterates the findings of the Commissioner (Appeals). He submits that it is not a deposit, as the adjudicating authority already appropriated the amount against the demand of Service Tax. So, it is a payment of Service Tax and Section 11B of the Act, 1944 would be governed. He relied upon the decision of the Tribunal in the case of United Spirit Ltd Vs CC (Import) Nhava Sheva - 2008 (228) ELT 360 (Tri-Mum). He also relied upon the decision of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd Vs Union of India - 1997 (89) ELT 247 (SC). Learned Authorised Representative on behalf of the Revenue also submits the decision relied upon by Ld. Advocate in respect of Hon'ble Supreme Court would relate to pre-deposit under Section 35F, which is not applicable in this case.

4. After hearing both the sides and on perusal of the records, I find that a show cause notice was issued proposing demand of Service Tax of Rs.6,07,032.00 for the period 01.07.2003 to 27.08.2005 under the category of Business Auxiliary Service. It is seen from the show cause notice that the appellant during investigation, deposited an amount of Rs.6,85,200.00 through TR6 challan dt.19.09.2005. The adjudicating authority appropriated the said amount against the demand of duty. Commissioner (Appeals) modified the adjudication order and reduced the demand of duty and accordingly the proportionate deposit was appropriated against the said demand. This fact was not disputed by the Department.

5. The Adjudicating authority returned the deposit amount as per claim of the appellant. By the impugned order, the Commissioner (Appeals) allowed the appeal of the Revenue on the

ground that the appellant has not filed their claim within one year from the date of order of the Commissioner (Appeals) and it is hit by limitation under Section 11B of the Central Excise Act 1944. I find that there is no dispute that the appellant deposited the amount during investigation. In this context, the Division Bench of the Tribunal in the case of Bajaj Auto Ltd (supra) held as under:

3. After hearing both the sides, we find that the amount in question was deposited by the appellant during the course of investigation and as such have to be considered as deposits. The part of the amount so deposited has not been found by the Commissioner to be payable. As such, the appellants are entitled to the excess amount deposits by them. The law on the point that such deposits are not hit by the barred by limitation stands decided by a number of precedent decisions of the Tribunal. Reference in this regard may be made to Tribunal's decision in the case of Suri Industries v. Commissioner of Central Excise, Bangalore [2001 (132) E.L.T. 480 (Tri.-Bang.)] as also to the Tribunal's decision in the case of Prempreet Textile Industries Ltd. v. Commissioner of Central Excise, Surat [2003 (158) E.L.T. 767 (Tri.)]. As such, the order of the authorities below that the refund is hit by barred of limitation cannot be sustained. The same is accordingly set aside and appeal allowed with consequential relief in accordance with law.

6. The Tribunal in the case of M/s Foods, Fats & Fertilizers Ltd Vs CCE Guntur (supra), after considering the decision of Hon'ble Supreme Court in the case of M/s Mafatlal Industries Ltd on the identical issue, allowed the appeal filed by the appellant. It is also noted that Hon'ble Supreme Court in the case of Suvidhe Ltd (supra) while dismissing the appeal, upheld the order of Hon'ble Bombay High Court and it has held that in respect of the deposit made under Section 35F of Central Excise Act 1944, the provisions of Section 11B can never be applicable, since it is not a payment of duty but only pre-deposit for availing the right of appeal. The learned Authorised Representative strongly relied upon the decision of the Tribunal in the case of United Spirit Ltd (supra). In that case, the Tribunal rejected the refund claim on the ground of unjust enrichment. In my considered view, the decision in the case of Bajaj Auto Ltd (supra) is directly applicable in the present case, as there is no issue of unjust enrichment. I also find that the decision of Hon'ble Supreme Court in the case of M/s Mafatlal Industries Ltd (supra) as relied upon by learned Authorised Representative has already been considered by the Tribunal in the case of M/s Foods, Fats & Fertilizers Ltd (supra).

7. In view of the above discussion, I find that the impugned order is not sustainable. Accordingly, Impugned order is set aside and the appeal is allowed with consequential relief, if any.

(Dictated & Pronounced in Court)

(P.K. Das)

Member (Judicial)