

Limitation period not applicable to refund claim of service tax paid mistakenly

The CESTAT, Delhi in *M/s Ishwar Metal Industries v. Commissioner, Central Excise and CGST, [Service Tax Appeal No. 51834 of 2018-SM dated January 28, 2022]* set aside the order rejecting the refund claim of the assessee for the Service tax paid mistakenly, passed by the Revenue Authority, on the grounds of limitation. Directed the Revenue Department to refund the amount to the assessee along with the interest @12% within 45 days.

Facts:

M/s Ishwar Metal Industries (“**the Appellant**”) filed refund claim along with interest under Section 11B of the Central Excise Act, 1944 (“**the Central Excise Act**”) of mistakenly paid Service tax amounting to INR 31,50,587/- on May 25, 2011 for the period 2007-08 to 2009-10 provided to Electricity Board/Nigam. The Assistant Commissioner (“**the Respondent**”) rejected the refund claim stating that the Appellant is required to deposit Service tax on the taxable services, on the ground that the refund claim has been filed after more than one year from the date of deposit of the tax.

Subsequently, the Appellant preferred an appeal before the Ld. Commissioner Appeals (“**the Appellate Authority**”) against the decision of the Respondent, wherein the appeal was dismissed and the decision of the Respondent was upheld.

Being aggrieved, the Appellant filed this appeal.

The Appellant contended that, as per *Circular No. 123/5/2010 -TRU dated May 24, 2010*, that clarified the applicability of service tax on laying of cables under or alongside roads and similar activities. The work undertaken by them, are not liable to service tax, hence no service tax was payable and all the services/work was allotted by the government was through open bidding. The price fixed as per work order is not affected due to levy of tax.

Issue:

Whether the Appellant is entitled to get the refund claim of service tax paid by mistake along with interest?

Held:

The CESTAT, Delhi in ***Service Tax Appeal No. 51834 of 2018-SM dated January 28, 2022*** held as under:

- Noted that, Service tax was not leviable on the services provided by the Appellant, which was paid by mistake, thus, it will be treated as deposit, ipso facto, and are entitled for refund.
- Observed that, the limitation under Section 11B of the Central Excise Act will not be applicable as the amount deposited by the Appellant is not tax but revenue.
- Further noted that, work orders issued to the Appellant in competitive open bid and it is clear that the prices are firm in all respect and independent of any variation. Furthermore, the Appellant have not charged any service tax in their invoices. Thus, unjust enrichment is not applicable.
- Set aside the order passed by the Respondent.
- Directed the Respondent to grant refund of the amount in cash, within 45 days, along with the interest @12% p.a. from end of 3 months from the date of refund application filed by the Appellant, till the date of grant of refund.

Relevant Provisions:

Section 11 of the Central Excise Act

“Claim for refund of duty

(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act;

Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty] paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise and interest, if any, paid on such duty] as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of

Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to-

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty] borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act

or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.

Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.”

(Author can be reached at info@a2ztaxcorp.com)

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