IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 75363 of 2016

(Arising out of Order-in-Appeal No. 1046/Pat/S.Tax/Appeal/2016 dated 15.03.2016 passed by the Commissioner (Appeals), Central Excise & Service Tax, Patna)

M/s. Bansal Biscuits Private Limited
(Plot No. B-6, 7, 8 &9, EPIP, Near Hajipur Industrial Area, Vaishali-844101, Bihar)

Appellant

VERSUS

Commr. of Central Excise & Service Tax, Patna
(Central Revenue Building, Birchand Patel Path, Patna-800001)

R**espondent**

APPEARANCE :
Mr. Ankit Kanodia & Ms. Megha Agarwal, Advocate for the Respondent
Mr. K. Chowdhury, Authorized Representative for the Appellant

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.77489/2023

Date of Hearing : 17 October 2023
Date of Pronouncement: 17/11/2023

PER R. MURALIDHAR:

The Appellant is a manufacturer of biscuits. Apart from being registered under Central Excise, they are also registered with Service Tax Authorities for paying Service Tax under Reverse Charge Mechanism for the GTA services utilized by them. They were paying Service Tax on 'Reverse Charge basis' on GTA Services. Vide Notification No. 25/2012-ST dated 20/06/2012, when 'food stuff' is transported, the same would be exempted from payment of Service Tax towards GTA expenses. However, without noticing this exemption, the Appellant continued to pay the Service Tax on 'Reverse Charge Basis' during the period July 2013 to March 2014. After noticing that they have paid Service Tax which is not required to be paid because of exemption granted under Notification No.25/2012-ST dated 20/06/2012 as amended by Notification No. 03/2013-ST dated 01/03/2013, they have filed their refund claim for

Rs.13,02,317/-. Show Cause Notice was issued seeking as to why the refund claim filed on 09/09/2015 should not be rejected as it is time barred as per Section 11B of the CEA, 1944. A corrigendum was issued on 23/10/2015 adding further allegation that the relevant documents towards non-passing of the duty incidence to others was not submitted. After due process, the Adjudicating Authority in his order has rejected the refund claim under Section 11B read with Section 83 of the Finance Act, 1994. On Appeal, the Commissioner (Appeals) has upheld the impugned order. Being aggrieved, the Appellant is before the Tribunal.

2. The Learned Counsel submits that the issues to be decided by the Tribunal are as under:-

(a) Whether biscuits can be classified as "Food Stuff" to be eligible for the exemption.

(b) Whether the refund claim can be regards as time barred.

3. The Learned Counsel relies on the case law of CGST Vs. Glaxo Smithkline Consumer Healthcare Ltd. Co. 2019 (28) G.S.T.L. 224 (Tri.-All.) He also relies on the final Order of this Tribunal FO/75701/2023 dated 19/05/2023, wherein on similar issue raised by the Department, the Department had dropped the issue of eligibility of exemption at the first stage and no further Appeal was preferred by them. This also proves that the Department has admitted that biscuits would fall under the category of "Food Stuff". He submits that biscuits have been held to be food stuff by the Tribunal. Therefore, he submits that the lower authorities are in error in holding that the exemption is not applicable in their case.

4. In respect of the rejection of refund claim on account of time bar in terms of Section 11B, he submits that the Appellant has paid the Service Tax which is not required to be paid in the first place. In such a case, it has been held by the various Tribunals and Supreme Court that when Service Tax has been paid by mistake, the provision of Section 11B could not be applicable. He relies on the following case laws:-

1. Venkatraman Guhaprasad Vs. Commr. of GST & C. Ex., Chennai, 2020 (42) G.S.T.L. 124 (Tri.-Chennai)

2. Commr. V. KVR Construction 2018 (14) G.S.T.L. J70 (S.C.)

3. Parijat Construction Vs. Commr. of Central Excise, Nashik, 2018 (359) E.L.T. 113 (Bom.)

4. 3E Infotech Vs. CESTAT, Chennai, 2018 (18) G.S.T.L. 410 (Mad.)

5. Commr. of C.Ex. (Appeals), Bangalore Vs. KVR Construction, 2012 (26) S.T.R. 195 (Kar.)

5. He submits that in all the above cases, it has been held that Section 11B Provision is not applicable for the refund claim. In view of the fore-going, he prays that the present Appeal may be allowed.

6. The Learned AR reiterates the findings of the lower Authorities and also has given the written submission on 27/10/2023. He submits that when the refund claim was filed beyond one year from the date of payment of tax, it is barred by limitation. He relies on the several case laws on this account. He also submits that the unjust enrichment clause was not addressed by the lower authorities and the Appellant did not provide the documents required at the lower stages.

7. Heard both sides and perused the Appeal papers and written submissions made by both the sides.

8. On going through the Show Cause Notice, it is seen that the only allegation contained therein is in respect of the belated filing of the refund claim and the Refund claim being hit by time bar in terms of Section 11B. The corrigendum issued on 23/10/2015 has raised the point of unjust enrichment. There is no reference whatsoever about questioning the eligibility of exemption for the biscuits. In the OIO, the Assistant Commissioner has given the following finding:-

> *Here the intention of law is to reduce the burden of tax on primary food stuff like flour, rice, sugar etc. To consider biscuit, a processed food item under the ambit of the said notification would be contrary to the very purpose and essence of the notification and hence, cannot*

be considered. Therefore, the instant application for refund is liable for rejection on this very ground.

Order

I reject refund application of Rs.13,02,317/- (Rupees Thirteen lakhs two thousand Three hundred and Seventeen) under Section 11B of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

9. Though he has made a reference about the Biscuits not being 'food stuff', in the discussions, he has not rejected the refund claim on this account in the Order portion. From the Order, it is clear that the only ground on which the refund claim has been rejected is on account of application of Section 11B i.e. time bar. The Commissioner (Appeals) has also upheld the OIO. Therefore, it has to be concluded that upto the OIA stage, the only ground on which the refund claim has been rejected is on account of Section 11B provisions. Therefore, there is no necessity for us to go into the aspect as to whether the biscuits can qualify as food stuff so as to be eligible for the exemption.

10. Even otherwise, on the same issue, in the case of Commr. of CGST, Ghaziabad Vs. Glaxo Smithkline Consumer Healthcare Ltd. Co. 2019 (28) G.S.T.L. 224 (Tri.-All.), the Tribunal has held as under;-

The revenue's only contention is that biscuits cannot be held to be foodstuff. We really fail to appreciate the above contention of the revenue, inasmuch as, the biscuits in question are edible biscuits and not gold biscuits. The eatable biscuits would definitely fall under the category of foodstuff. Inasmuch as, the biscuits, as discussed by Commissioner (Appeals), is nothing but food, the size and timing for eating the same may change but never the less biscuits remains food item only. No reason stands given by the revenue as to why the biscuits has to be held as different from the category of food. The only contention of the Revenue is that foodstuff is relatable to only those items which can be further processed and the biscuits which are ready to use cannot be held to be foodstuff. We find no merits in the above stand of the Revenue. The foodstuff is a clear, unambiguous word and there is nothing to indicate that the same would apply to transportation of the raw material etc. which have to be further converted into a final edible product.[Emphasis supplied]

> ***3.*** *In view of the foregoing, we find no merits in the revenue's appeal and the same is accordingly rejected.*

11. So far as the issue as to whether the refund is covered by time bar under Section 11B is concerned, in the case of Commr. of C. E. (Appeals), Bangalore Vs. KVR Construction- 2012 (26) STR 195 (Kar.), High Court of Karnatka has held as under:-

> ***22.*** *In the case of Commissioner of Central Excise, Bangalore v. Motorola India Pvt. Ltd. (supra) the Division Bench of this Court considered similar issue. It was a case where excess amount was paid over duty under Central Excise Act on the direction of the Department. There was an application for refund of amount and the same came to be rejected by the Assistant Commissioner on the ground of lapse of time. It was confirmed by both the Appellate Authority and also the Tribunal. Aggrieved by the order of the Tribunal, revenue came up before the High Court. Their lordships of the Division Bench held that order of the Tribunal to allow the claim on the basis that amount paid by mistake cannot be termed as duty in the said case was justified and therefore applying the law laid down in the decision of Apex Court in the case of India Cements Ltd. v. Collector of Central Excise - 1989 (41) E.L.T. 358, dismissed the appeal.*
>
> ***23.*** *Now we are faced with a similar situation where the claim of the respondent/assessee is on the ground that they have paid the amount by mistake and therefore they are entitled for the refund of the said amount. If we consider this payment as service tax and duty payable, automatically, Section 11B would be applicable. When once there was no compulsion or duty cast to pay this service tax, the amount of Rs. 1,23,96,948/- paid by petitioner under mistaken notion, would not be a duty or "service tax" payable in law. Therefore, once it is not payable in law there was no authority for the department to retain such amount. By any stretch of imagination, it will not amount to duty of excise to attract Section 11B. Therefore, it is outside the purview of Section 11B of the Act. [Emphasis supplied]*
>
> Affirmed by Supreme Court as reported in Commissioner Vs. **KVR Construction reported in 2018 (14) G.S.T.L. J70 (S.C.).**

12. Similarly, in the case of following cases, the co-ordinate Benches have held that refund claims filed on account of Service Tax

paid by mistake, are not governed by the time limit specified under Section 11B.

1. Venkatraman Guhaprasad Vs. Commr. of GST & C. Ex., Chennai, 2020 (42) G.S.T.L. 124 (Tri.-Chennai)

2. Commr. V. KVR Construction 2018 (14) G.S.T.L. J70 (S.C.)

3. Parijat Construction Vs. Commr. of Central Excise, Nashik, 2018 (359) E.L.T. 113 (Bom.)

4. 3E Infotech Vs. CESTAT, Chennai, 2018 (18) G.S.T.L. 410 (Mad.)

5. Commr. of C.Ex. (Appeals), Bangalore Vs. KVR Construction, 2012 (26) S.T.R. 195 (Kar.)

13. Based on the decision of Third Member Reference Bench, the CESTAT, Hyderabad vide its **Final Order No. A/30082/2022 dated 05/09/2022 in the Credible Engg. Construction Vs. CCE, Hyderabad,** has held as under:-

"46. In view of the difference of opinion, the following questions arise for consideration by learned 3rd Member:

(1) Whether the limitation prescribed under section 11B of the Central Excise Act will not be applicable as the tax was paid erroneously though eligible to exemption and as such is in the nature of deposit and hence limitation is not attracted as held by Member (Judicial) following the ruling of Hon'ble Karnataka High Court in KVR Construction affirmed by Hon'ble Supreme Court 2018(14) STR J17.

39. The reference is accordingly, answered in the following manner:

"The limitation prescribed under section 11B of the Excise Act would not be applicable if an amount is paid under a mistaken notion as it was not required to be paid towards any duty/tax."

14. The above decision of the CESTAT, which is based on the third member reference Bench's decision, amounts to LB decision on the issue. The decision of this Final Order is squarely applicable to the

facts of the present case. Therefore, it is held that in the present case the provisions of Section 11B (time limit) would not be applicable.

15. Coming to the point raised by the Learned AR with regard to non-addressing of the unjust enrichment by the lower authorities, as observed in the previous paragraphs, the Adjudicating Authority has failed to address this issue. No further Appeal was filed by the Department before the Commissioner (Appeals). The Commissioner (Appeals) has upheld the order passed by the Adjudicating Authority. The Revenue has not filed any Appeal by their grievance, if any about non-addressing of the unjust enrichment issue. This being so, when the Department itself has not addressed this issue at lower stages nor agitated before us by way of proper Appeal, such submissions made during the Final Hearing cannot be entertained by the Tribunal at this juncture. Therefore, the objection with regard to 'Unjust Enrichment' cannot be sustained. Even otherwise, in the cited decision of the Tribunal in the case of Credible Engg. (cited supra), it is held that Section 11B Provisions are not applicable which would also include the provisions of 'Unjust Enrichment' under Section 11B also not being applicable in respect of such refund cases.

16. In view of the foregoing, we allow the Appeal with consequential relief, if any, as per law.

(Order was pronounced in the open court on 17/11/2023)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Pooja