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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT

Decided On : Sep-25-2007

Reported in : (2008)12STJ16CESTAT(Bang.)alore

Judge : R Abichandani, J T T.K.

Appellant : Kerala Venture Capital Fund (P)

Respondent : The Commissioner of Central

Judgement :

1. This appeals have been filed against Order-in-Appeal No. 06/2006 ST dated 25.1.2006 passed by the Commissioner of Central Excise and Customs (Appeals), Cochin.

2. The appellant M/s. Kerala Venture Capital Fund (P) Ltd. was functioning as the Asset Managing Company of the Kerala Venture Capital Fund. The function of the appellant is to manage the venture capital.

The appellant in terms of the agreement entered by them with Kerala Venture Capital Fund received Rs. 40/- lakh as management fee in advance in the year 2003-2004. Therefore, Service Tax at the rate of 5% was paid in advance by the appellant. The Service Tax amounted to Rs. 2/- lakh. Before the conclusion of the financial year, on March 25th 2003-2004, the appellant entered into a supplementary agreement with the Kerala Venture Capital Fund. The effect of the agreement is that the management fee would be based on the actual expenditure

and whatever fee collected in excess would be refunded to the appellant by the Kerala Venture Capital Fund (P) Ltd. In terms of the supplementary agreement, effective from 1.4.2003, the management fund was reduced to Rs. 28/- lakh. Consequently, the appellant had paid Rs. 60,000/- Service Tax in excess, hence, they applied for refund of this Rs. 60,000/-. But, the Original Authority issued a show cause notice on the ground that the appellants had not produced any evidence to show that they had not passed on the tax burden to the recipient of the service viz., Kerala Venture Capital Fund. Even at the time of personal hearing, the appellant did not produce any evidence before the Original Authority viz., Deputy Commissioner. The Deputy Commissioner in his order has recorded that the appellant had not produced any evidence to show that they had not passed the tax burden to the recipient of the Service Tax. Therefore, although he sanctioned the refund, he credited the same to the Consumer Welfare Fund. The appellants approached the Commissioner (A). The Commissioner (A) after going through the records of the case gave a finding that the appellant had not passed on the benefit of Service Tax to their client at the time of filing of refund claim, even though they had refunded it on 27.10.2004 in terms of the Chartered Accountant's certificate issued to them. Aggrieved over the decision of the Commissioner (A), the appellants have come before this Tribunal for relief.

3. Shri A. Gopakumar, learned advocate appeared on behalf of the appellant and Shri Sunith Kumar, learned DR for the Revenue.

4. We heard both sides. The learned advocate took us through the original agreement and also the supplementary agreement. He urged the point that only in terms of the original agreement which was entered in the year 2000, the supplementary agreement was made and in terms of the supplementary agreement, the appellants are rightly entitled for the refund of the excess Service Tax paid. He also urged that the Chartered Accountant has certified that the excess tax has been refunded to the recipient of the service. He invited our attention to the certificate wherein the Chartered Accountant has stated that the excess amount collected has been refunded to the service recipient on 31.3.2004 and 27.10.2004 respectively. He also relied on the decision of the Tribunal in the case of Shiva Analytical (I) Ltd. v. Commissioner of Service Tax, Bangalore 2007

(7) STR 35 (Tri.-Bang.) wherein the Chartered Accountant's certificate which was produced was accepted and the Tribunal held that there was no unjust enrichment as the appellant who erroneously paid Service Tax when the liability was absent had returned the Service Tax collected to the clients by way of issue of credit notes and cheques.

4.1 The learned Departmental Representative argued that in the present case there is no question of refund of the amount claimed by the appellants. He said that the appellants at the beginning of the year had already collected the management fee and correctly paid the Service Tax of Rs. 2/- lakh. Just 5 days before the conclusion of the financial year, they had entered into the supplementary agreement and in terms of the supplementary agreement, their management fee was reduced. He argued that once the liability of the Service Tax has been discharged at the beginning of the year, subsequently, the appellant cannot claim for refund by entering into an agreement at the fag end of the financial year to deprive the Revenue of its due. He relied on a large number of case laws which hold that once the duty burden has been passed on to the buyer, later any adjustment by way of credit note will not undo the bar of unjust enrichment. He invited our attention to the ratio of the decision in the case of Sangam Processors Ltd. v. Collector of Central Excise, Jaipur , wherein it was held that subsequent credit notes in respect of duty incidence issued by the assessee to the customers is not admissible. He urged the point that this decision of the Sangam Processors case has been followed in various decisions of the Tribunal. Further, the Sangam Processors decision has been upheld by the Hon'ble Apex Court. He invited our attention to the decision of the Lager Bench in the case of S. Kumar's Ltd. v. CCE, Indore wherein the Larger Bench has held in the context of the Sangam Processors decision that when a civil appeal is dismissed even though without assigning reasons it will have an effect of binding precedent unlike the case of dismissal of a special leave petition. In the case of Sangam Processors Ltd., the assessee approached the Hon'ble Apex Court by way of filing Civil Appeal and the Civil Appeal was dismissed. Therefore, it was held that the Sangam Processor's case has a binding effect as the law of land declared by the Hon'ble Apex Court. Further, the learned SDR relied on the following case laws.CCE, Chandigarh v. HIM Cylinders Pvt. Ltd. 2007 (207) ELT 682 (Tri.-

Del.)Ballarpur Industries Ltd. v. CCE, BhuvaneshwarA.K. Enterprise v. CC (Port), Kolkata 2006 (199) ELT 67 (Tri.- Kolkata) (iv) Jyoti Structures Ltd. v. CC and CE, Aurangabad .

The learned departmental representative urged the point that while claiming refund it is the duty of the claimant to file an affidavit before the authority that they had not passed on the burden of duty. He said that this has been laid down by the Supreme Court in the case of Mafatlal Industries v. UOI . The learned departmental representative also pointed out that the Chartered Accountant's certificate cannot be blindly accepted because at the time of filing of the refund application, it is on record that the appellant had not passed on the tax benefit to the recipient. In this connection, he also relied on the decision of the Tribunal in the case of Mamirex and Co.

v. CCE, Allahabad 2004 (174) ELT 216 (Tri.-Del.) wherein in the facts and circumstances of the case, the Chartered Accountant's certificate which was based only on an inference was not accepted.

4.2 On a very careful consideration of the issue, we find that the appellant claimed the refund of Rs. 60,000/- being the excess Service Tax paid. However, the Original Authority issued a show cause notice for rejecting the refund claim on the grounds of unjust enrichment.

The show cause notice was issued on 27.7.2004 and the appellants had filed a reply to the show cause notice on 10.8.2004. The personal hearing was granted on 15.9.2004. It is seen from the records that the Chartered Accountant had certified that the excess tax was refunded only on 27.10.2004. That means when they filed the refund claim and also even at the time of the personal hearing, the appellants had not passed on the tax burden to the service recipient. In other words, even at the time of personal hearing which was on 15.9.2004 before the Original Authority, the benefit of the Service Tax has not been passed on to the clients. They refunded the credit only on 27.10.2004. In the facts and circumstances, we find that while claiming the refund in terms of the Supreme Court decision in the Mafatlal case, it was incumbent on them to produce evidence before the Original Authority to show that they had not passed on the tax burden to

the service recipient. The factual situation is that the excess tax was not refunded to the service recipient by the appellants at the time of filing the refund claim. With regard to the Central Excise, so many cases laws have been cited. In all these cases, it has been held that if the assessee fails to produce evidence to prove that the tax burden has not been passed on to the buyer, the issue of credit notes subsequent to the time of clearance will not help the assessee in overcoming the unjust burden problem. This is very clear from the decision of the Tribunal in the Sangam Processors case.

This ratio has been consistently followed by the Tribunal in very many decisions. In these circumstances, the Commissioner (A) was right in upholding the order of the Original Authority. The Commission (A) has given a finding that the appellant had sufficient time from 27.7.2004 (i.e. the date of issue of show cause notice) to 15.9.2004 (i.e. the date of personal hearing) to pass on the benefit of Service Tax to their clients but they refunded it only on 27.10.2004. He has observed that no cogent reasons have been given for the said delay. In our view, the Commissioner (A) has rightly rejected the party's appeal and has rightly upheld the Order-in-Original. We do not find any reason to interfere with the impugned order. Hence, the appeal is rejected.

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