CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

REGIONAL BENCH - COURT NO. 02

Service TaxAppeal No. 86418 of 2016

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-027-16-17dated 12.04.2016 passed by Commissioner of Service Tax (Appeals), Pune)

M/s RVS Hospitality & Development Pvt. Ltd. .....**Appellant**
Tech Park One, Tower 'E',
3rd Floor, S.No. 191/A/21/12,
Off Airport Road,
Next to Don Bosco School,
Yerwada, Pune-411006

VERSUS

Commissioner of Central Excise & Service Tax, Pune-I .....**Respondent**
F- Wing, 3rd Floor, ICE House,
Sasson Road, Pune-411001

Appearance:

Shri Prasad Paranjape along with Mohit Rawal, Advocates for the Appellant
Shri Onil Shivadikar, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

FINALORDER NO. A/86809 / 2019

Date of Hearing: 16.09.2019
Date of Decision: 16.09.2019

Per: S.K. MOHANTY

This appeal is directed against the impugned order dated 12.04.2016 passed by the Commissioner of Service Tax (Appeals), Pune.

2. Briefly stated, the facts of the case are that the appellant is engaged in providing taxable service under the category of immovable property service, liable for payment of service tax. For providing such service, the appellant is registered with service tax department. During the disputed period, the appellant had rented its property to one of its customers

namely,Nvidia Graphics Pvt. Ltd. For providing the property on rent, the appellant had issued monthly rental invoices along with applicable service tax to the said customer. However, while making payment of service tax amount into the Government exchequer, the appellant had claimed the benefit of Notification No. 24/2007-ST dated 22.05.2007. Since, the benefit of the said notification was availed by the appellant, which was not passed on to the customer, the department initiated show cause proceedings against the appellant under Section 73A of the Finance Act, 1994 for recovery of the service tax amount collected from the customer. The matter was adjudicated vide order dated 27.11.2015, wherein an amount of Rs.10,16,577/- was confirmed under Section 73A (4) *ibid* along with interest and also Rs.10,000/- was imposed as penalty under Section 77(2) *ibid*. On appeal, the learned Commissioner (Appeals) vide impugned order dated 12.04.2016 has upheld the adjudged demands confirmed on the appellant.

3. The learned AR appearing for the appellant submits that the benefit of Notification No. 24/2007-ST dated 22.05.2007 claimed by the appellant was subsequently passed on to the customer. In this context, he has referred to the paragraph 10 in the adjudication order to state that the original authority had accepted the fact of refund of such amount by the appellant in favour of its customer. Thus, he submits that since the appellant had refunded the amount back to its customer, the provisions of Section 73A shall not be applicable for recovery of the amount mentioned therein. He has referred to the judgment of Hon'ble Supreme Court in the case of R.S. Joshi, Sales Tax Officer, Gujarat Vs. Ajit Mills Ltd. – (1977) 4 SCC 98 and the

decision of this Tribunal in the case of Commissioner of Central Excise, Jaipur Vs. VinayakAgrotech Ltd. – 2012 (284) ELT 237 (Tri.-Del.), to state that on return of the service tax amount to the customer, the provisions of Section 73A and 73B *ibid* should not be applicable.

4. On the other hand, the learned AR appearing for the Revenue reiterates the findings recorded in the impugned order. He further submits that the provisions of Section 73A *ibid* have been rightly invoked by the department in confirming the amount in question inasmuch as at the time of claiming the benefit of notification dated 22.05.2007, the appellant had not passed on the benefit of service tax to its customer. He further submits that there was possibility of availment of excess Cenvat credit by the customer and under such circumstances, if the amount cannot be recovered under Section 73A *ibid*, the appellant would be unjustly enriched at the cost of the Government exchequer.

5. Heard both sides and perused the records.

6. It is an admitted fact on record that the disputed amount in question was paid back by the appellant to its customer subsequent to issuance of the show cause notice. Thus, under such circumstances, it cannot be said that the provisions of Section 73A *ibid* should be applicable for recovery of such amount, considering the same as a collection of excessservice tax from the customer. I find that under an identical situation, this Tribunal in the case of VinayakAgrotech Ltd. (supra) has rejected the appeal filed by Revenue, holding as under:-

> *"8. Considering the provisions of Section 11D, it is seen that the same are to the effect that every person who is liable to pay duty under this Act and the Rules made thereunder and has collected any amount in excess of the duty assessed on determined and paid on any excisable goods under this Act or the Rules made thereunder from the buyers of such goods in any manner as representing duty of excise shall forthwith pay the amount so collected to the credit of the Central Govt. In the present case, admittedly, the appellant was not liable to pay any duty of excise inasmuch as the goods were exempted. It is only that in the month of March, 2003, when their final product was brought under the duty, the respondents started collecting duty @ 8% from their customers. However, when they felt that such duty is not required to be paid to the Revenue, they returned the such collected duty to their customers by way of raising credit notes. As such it cannot be said that in terms of the provisions of Section 11D, the respondents have collected any duty from their customers representing the same as excess duty. As such, demand in terms of Section 11D is not required to be confirmed against the respondents. We do not find any infirmity in the order passed by Commissioner (Appeals). Accordingly, the appeal filed by the Revenue is rejected."*

7. The above decision of the Tribunal though was rendered under Section 11D of the Central Excise Act, 1944 but the ratioof the said decision squarely applies to the facts of the present case inasmuch as the provision of 11D *ibid*and Section 73A ibid are *parimateria*.

8. In view of above, I do not find any merits in the impugned order. Accordingly, after setting aside the same, appeal filed by the appellant is allowed.

(Dictated and pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

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