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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO.41 OF 2007

The Commissioner of Service Tax
Mumbai ...Appellant
vs.
M/s.Prachar Communication Ltd. ...Respondent

Mr.M.Dwivedi i/b Mr.Sham Walve for the appellant
None for the respondent

CORAM : A.S.OKA, &
RIYAZ I. CHAGLA,JJ.
DATE : SEPTEMBER 25, 2017

ORAL JUDGMENT: (PER A.S.OKA,J.)

1 Called out for final hearing. Heard the learned counsel for the appellant-revenue. The respondent applied for refund of the amount paid as service tax while rendering services of advertising agency. According to the case of the respondent, the service tax was erroneously paid on gross amount of bills before the discount was allowed of 15% on the gross bill irrespective of the discount allowed to the advertisements. It is contended by the respondent that the tax is payable on the gross amount actually charged from the client i.e after discount.

2 There were two refund claims in the sum of Rs.1,14,060 and Rs.3,67,935/- respectively on the same grounds. Show cause notices were issued to the respondent. In the show cause notices, the allegation was that the respondent has failed to

furnish documents to establish that the amount of service tax for which the refund is claimed has been collected by the respondent from its clients and that incidence of such tax has not been passed on to any other person.

3 On the basis of the show cause notices, adjudication was made by the Deputy Commissioner of Central Excise. In paragraph 14 of his order, the Deputy Commissioner held thus:

> "39 As regards passing of refund claim to the client, it is observed from the bills raised to M/s.Emami Ltd by M/s.Prachar Communications Ltd, that they charged discounted amount to their clients but paid service tax on the prediscounted amount i.e on the commission @ 15% allowed by the media on the mount billed to them towards the telecast/broadcasting charges, however, after realizing their mistakes that they were erroneously paying service tax on higher value than the actual value of services received from their clients i.e M/s.Emami Ltd, they raised credit notes No.31 dated 31.3.2000 and 3 dated 16.8.2000 for Rs.1,14,060/- and 3,67,935/- respectively, towards extra service tax charged to M/s.Emami Ltd. In support of their claims they have produced the copies of credit notes No.31/31.3.2000 and 3/16.8.2000, ledger account of M/s.Emami Ltd maintained by M/s.

Prachar Communications Ltd., for the period from 1.3.2000 to 31.3.2000 and 1.8.2000 to 31.8.2000 alongwith confirmation letter dated 16.1.2001 duly supported with sundry creditors A/c from M/s.Emami Ltd. I am convinced with the aforesaid documents produced on records that there is no unjust enrichment in this case. Accordingly, I hold that both the claims filed by the assessee are in order to the extent."

(underline supplied)

4 Show cause notices cum demand notices were issued by the Deputy Commissioner (Central Excise) Service Tax, Mumbai on the ground that refund claim was sanctioned erroneously. Accordingly, adjudication was made by the Commissioner of Central Excise on the said show cause notices. By the order dated 4th October 2002, the Commissioner held that both the refund claims have been erroneously allowed. The Commissioner recorded the following finding of fact :

"In the present case, the assessee has not amended/rectified the grossed bill or issued a revised bill before payment of service tax. Subsequently reimbursement of service tax does not in any way change the position that the assessee passed on the burden excess of service tax charged by them to their client. No proof,as discussed earlier, is shown by them to prove that M/s.Emami Ltd., did not

> further pass on the service tax to ultimate consumer or buyer of the product."
>
> (underline supplied)

5 Being aggrieved by the said order, the respondent preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (Appellate Tribunal). By the impugned Judgment and order, the said appeal has been allowed and the order of the Commissioner of the Central Excise, Mumbai was set aside. Hence, the orders granting the refund were restored.

6 This appeal was admitted on the substantial questions of law incorporated in paragraph 4 of the Memorandum of Appeal.

7 The said substantial questions of law are as follows:

> "(A) Whether the Respondents are entitled to refund of the excess service tax paid by them in terms of Rule 6 of the Service Tax Rules?
>
> (B) Whether post clearance adjustment like issue of credit notes would help the Assessee to get over the bar of unjust enrichment under Section 11B of the Central Excise Act,1944?
>
> (C)Whether Rule 6 of Service Tax Rules 1944 will have precedence over section 11B of the Central Excise Act,1944 which is made applicable to provisions of Finance

Act,1994?"

8 The learned counsel for the appellant relied upon the decision of the Apex Court in the case of Commissioner of Central Excise, Madras vs.Addison & Company Limited[1]. He submitted that the respondent has not discharged the burden of proving that the incidence of such duty has not been passed by him to any other person. He invited our attention to the findings recorded by the Appellate Tribunal and submitted that there is no finding recorded by the Appellate Tribunal that the respondent has discharged the burden on him. He would, therefore, submit that the impugned Judgment and Order which is patently illegal deserves to be set aside. None appears for the respondent.

9 We have carefully considered the submissions. Firstly, it will be necessary to advert to the decision of the Apex Court in the case of Commissioner of Central Excise, Madras vs. Addison & Co.Limited (supra). Paragraph 19 of the said decision reads thus:

> "19 <u>The since qua non for a claim for refund as contemplated in Section 11B of the Act is that the claimant has to establish that the amount of duty of excise in relation to which such refund is claimed was paid by him and that the incidence of such duty has not been passed on by him to any other person</u>.

1 2016 (339) ELT 177 (S.C.)

Section 11B(2) provides that in case it is found that a part of duty of excise paid is refundable, the amount shall be credited to the fund. Section 2(ee) defines Fund to mean the Consumer Welfare Fund established under Section 12C. There is a proviso to Section 11B (2) which postulates that the amount of excise duty which is refundable may be paid to the applicant instead of being credited to the fund, if such amount is relatable to the duty of excise paid by the manufacturer and he had not passed on the incidence of such duty to any other person. <u>Clause (e) to proviso of Section 11B(2) also enables the buyer to receive the refund if he had borne the duty of excise, provided he did not pass on the incidence of such duty to any other person</u>. There is a third category of a class of applicants who may be specified by the Central Government by a notification in the official gazette who are also entitled for refund of the duty of excise. A plain reading of Clauses (d), (e) and (f) of the proviso to Section 11B(2) shows that refund to be made to an applicant should be relatable only to the duty of excise paid by the three categories of persons mentioned therein i.e the manufacturer, the buyer and a class of applicants notified by the Central Government. Clause (e) refers to the buyer which is not restricted to the first buyer from the manufacturer. The buyer mentioned in the above Clause can be a buyer downstream as well. While dealing with absence of a provision for refund to the consumer in the rules this Court in Mafatlal Industries v. Union of India (supra) held as follows:

> "98 A major attack is mounted by the learned counsel for petitioners-appellants on Section 11B and its allied provisions on the ground that real purpose behind them was not to benefit the consumers by refusing refund to manufacturers (on the ground of passing on the burden) but only to enable the Government to retain the illegally collected taxes. It is suggested that the creation of the Consumer Welfare Fund is a mere pretence and not an honest exercise. By reading the Rules framed under section 12D, it is pointed out, even a consumer, who has really borne the burden of tax and is in a position to establish that fact, is yet not entitled to apply for refund of the duty since the Rules do not provide for such a situation. The Rules contemplates only grants being made to Consumer Welfare Societies. Even in the matter of making grants, it is submitted the Rules are so framed as to make it highly difficult for any consumer organization to get the grant. There is no provision in the Act,

Shri Nariman submitted, to locate the person really entitled to refund and to make over the money to him. “We expect a sensitive Government not to bluff but to hand back the amounts to those entitled thereto”, intoned Shri Nariman. It is a colourable device- declaimed Shri Sorabjee - “a dirty trick” and “a shabby thing”. The reply of Shri Parasaran to this criticism runs thus: It ill-becomes the manufactuers/Assessees to espouse the cause of consumers, when all the while they had been making a killing at their expense. No consumers' organisation had come forward to voice any grievance against the said provisions. <u>Clause (e) of the proviso to sub-section (2) of Section 11B does provide for the buyer of the goods, to whom the burden of duty has been passed on, to apply for refund of duty to him, provided that he has not in his turn passed on the duty to others</u>. It is, therefore, not correct to suggest that the Act does not provide for refund of duty to the person who has actually borne the burden. There is no vice in the relevant provisions of the Act. Rules cannot be relied upon to impugn the validity of an enactment, which must stand or fall on its own strength. The defect in the Rules, assuming that there is any, can always be corrected if the

> experience warrants it. The Court too may indicate the modifications needed in the Rules. The Government is always prepared to make the appropriate changes in the Rules since it views the process as a "trial and error" method – says Shri Parasaran."
>
> (underlines supplied)

10 It is in the light of the law laid down by the Apex Court that the merits of the appeal will have to be examined. The case made out by the respondent in the refund application was that it rendered services to M/s.Emami Limited by getting their advertisements published on the media. The contention was that the service tax was erroneously paid by the respondent on the gross amount of the bills before the discount was allowed of 15% of the gross bill amount. The contention was that incidence of service tax payable on 15% amount has not been passed on to any other person by the respondent.

11 We have already quoted the findings recorded by the Deputy Commissioner as well as the Commissioner (Appeals). The findings recorded are that the refund claim was based only on two credit notes and ledger account of M/s.Emami Limited. The Deputy Commissioner held that he was convinced that there is no unjust enrichment in this case. The finding recorded by the Commissioner of Central Excise is already quoted above. The Commissioner (Appeals) held that the first respondent has not amended or

rectified the bills or the issued revised bills. Moreover, no material was placed on record to show that M/s.Emami Limited did not pass on the incidence of service tax to the buyers or customers of its products. This finding recorded by the Commissioner of Central Excise is not disturbed by the Appellate Tribunal. Perhaps, the Appellate Tribunal oversimplified the matter by observing in paragraph 4 that there was no dispute that the realization for service was less than bill amount entitling the respondent to pay duty on the net amount received after discount. The only other finding recorded by the Appellate Tribunal is that the respondent has admitted that service tax is paid to its customers. This finding is based on the credit notes issued by the respondent to M/s.Emami Limited. There is no finding recorded by the Appellate Tribunal that M/s.Emami Limited did not pass on incidence of service tax on the 15% amount to its customers or buyers of the products. The burden was on the respondent to establish that M/s.Emami has not passed on the incidence of service tax to any other person including its customers or purchasers of the products. Thus, even going by the finding of fact recorded by the Appellate Tribunal, in paragraph 5 and the finding of fact recorded by the Deputy Commissioner in paragraph 14, the respondent did not establish that the incidence of service tax has not been passed by M/s.Emami Limited to any other person.

12 As stated earlier, the finding recorded by the Commissioner (Appeals) has not been disturbed by the Appellate Tribunal. Hence, the Appeal must succeed.

13 We pass the following order:

(I) Impugned Judgment and order dated 31st March 2006 of the Appellate Tribunal in Appeal No.ST/1/03 is hereby set aside;

(II) As a result of setting aside of the order passed by the Appellate Tribunal, the order dated 4th October 2002 passed by the Commissioner of Central Excise, Mumbai-IV stands restored;

(III) Appeal is allowed on above terms with no orders as to costs.

(RIYAZ I. CHAGLA,J.) (A.S.OKA,J.)