IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.04.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
And
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.1403 of 2015

M/s.Enmas Andritz Pvt. Ltd
Rep. by its Managing Director Mr.Loknath Ratho
... Appellant

Vs.

1.The Customs, Excise and Service Tax Appellate Tribunal,
Haddows Road, Shastri Bhawan Annexe 1st Floor
Chennai - 600 006.
By its Assistant Registrar

2.The Commissioner of Service Tax
Newry Towers, Anna Nagar
Chennai - 600 040. ... Respondents

Prayer:

Appeal filed under Section 35G of the Central Excise Act, 1944, against the Misc. Order No.42196/2014 dated 18.08.2014 in Final Order No.40465/2013 dated 18.10.2013 in ST/Stay/40950/2013 in ST/41300/2013-SM passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.N.Viswanathan
For Respondents: Mr.A.P.Srinivas
Senior Standing Counsel

J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1.This is an appeal preferred against the Judgment and order dated 18.08.2014 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai (in short, the Tribunal).

1.1.To be noted, on 13.08.2015, this Court framed the following Questions Of Law for consideration:

"(i)Whether the Tribunal was correct in allowing the appeal of the revenue after holding that the amount of refund claimed by the appellant herein was collected without the authority of law but such collection was not unconstitutional by an improper consideration and reliance upon the judgment of the Hon'ble Apex Court in the Mafatlal case reported in 1997 (89) ELT 247 (SC)?

(ii)Whether the Tribunal was correct in traversing beyond the scope of appeal filed by the revenue, which only contested the application of the period of limitation under the Limitation Act as against the one provided under Section 11B of the Central Excise Act made applicable to the provisions of the Finance Act, 1994? and

(iii)Whether the Tribunal was correct in not following the ratio of the judgment of the Hon'ble Gujarat High Court in the case of Binani Cement Vs. Union of India reported in 2013 (288) ELT 193 (Guj.)?"

2.We may note that this is a harsh case, where the appellant ended up paying service tax, even though, it was a recipient of the service and that too, prior to the amendment, brought in, with effect from 18.04.2006. By way of amendment, Section 66 A was inserted in the Finance Act, 1994. By virtue of this provision, service tax could be collected from the recipient of service, by way of a deeming fiction, where service provider was located outside the Country.

3.In the instant case, the Appellant/Assessee, virtually, in ignorance of the provisions of law ended up paying service tax for the period 01.04.2005 to 17.04.2005. The Appellant/Assessee, it appears, realized this mistake, once a judgment was delivered by the Bombay High Court in the matter of: Indian National Shipowners Association Vs. Union of India, 2009 (13) S.T.R.235 (Bom.).

3.1.Incidentally, the Special Leave Petition against the said judgment was dismissed, albeit, in limine. The SLP was dismissed on 14.12.2009.

4.It is, thereafter that the Appellant/Assessee preferred the refund claim. The refund claim was preferred by the Assessee, as is evident from the order-in-original, on 05.05.2010.

4.1.Admittedly, the refund claim was filed under Section 11B of the Central Excise Act, 1944, which is applicable to service tax refund claims by virtue of the provisions of Section 83 of the Finance Act, 1994.

4.2. The Adjudicating Authority, vide order dated 13.07.2010, dismissed the refund claim, preferred by the appellant/ Assessee, as it was beyond limitation.

5.The appellant being aggrieved, preferred an appeal with the Commissioner of Central Excise (Appeals) [in short, Commissioner (Appeals)].

5.1.The Commissioner (Appeals), however, ruled in favour of the Appellant/ Assessee. The Commissioner (Appeals) vide order dated 12.02.2013, held that since service tax had been inadvertently remitted, it was not in effect, tax under the Statute, and therefore, the provisions of Section 11B of the Central Excise Act, 1944, were not applicable in the instant case. Accordingly, the order of the Adjudicating Authority was reversed with a direction to grant consequential relief.

5.2.The Revenue, however, carried the matter in appeal to the Customs, Excise and Service Tax Appellate Tribunal (in short, the Tribunal).

5.3.The Tribunal vide judgment and order dated 18.10.2013 allowed the appeal. While allowing the appeal, the Tribunal made the following observations in paragraph nos.18 and 19 of its judgment:

> "18.I am of the view that in the case of Indian National Ship Owners' Association, the Hon. Bombay High Court and Apex Court did not consider the levy to be unconstitutional in the sense it was not a levy beyond the powers given by Constitution. This position is clear because after insertion of section 66A of the Act, now such tax is being collected without any successful challenge to the said section. Prior to 18.04.2006 when 66A was introduced the only issue was that the Rule under which the tax was collected was considered to be not authorized by provisions in Finance Act, 1994. So the levy has to considered only as "without authority of law" and not as "unconstitutional". So the decision of the Apex Court in para 70 in the case of Mafatalal Industries Ltd. (being the majority view) should apply.
>
> 19.Even otherwise if the claim is made under section 72 of the Indian Contract Act and section 17(1)(c) of the Limitation Act, the claim has to be instituted before a civil court or a writ court and not before an authority exercising powers under Finance Act, 1994 and Central Excise Act 1944. Such authorities have no powers to grant such refund except in accordance with provisions of section 11B."

6. In sum, based on the aforesaid observations, the Tribunal, as indicated above, allowed the appeal and set aside the order of the Commissioner (Appeals).

7.The Appellant/ Assessee has preferred the instant statutory appeal, in the background of the aforesaid facts and circumstances.

8.Mr.N.Viswanathan, who appears on behalf of the Appellant/ Assessee says the order of the Tribunal is erroneous, in as much as, it is observed in the impugned judgment, that the levy though "without the authority of law" was not unconstitutional.

8.1.Learned counsel says that since the tax was paid and collected, under mistake of law, the very collection, being contrary to the provisions of Article 265 of the Constitution, will make it unconstitutional and therefore, on that short ground alone, the impugned judgment, ought to be reversed.

9.While we are in agreement with the learned counsel for the Appellant/Assessee that the observation of the Tribunal, that the levy should be construed as one "without authority of law" as against being "unconstitutional", is erroneous, we are unable to disagree with the Tribunal, that perhaps, the remedy for claiming refund, lay, in the Appellant/ Assessee filing an action by way of a suit or writ petition.

10.This was, in our opinion, at best, a case where the tax Authorities had acted beyond their jurisdiction. The tax Authority, being creature of statute, had no jurisdiction to collect tax from the recipient of service, prior to the date of amendment of the Statute, which, admittedly, was brought about on 18.04.2006.

10.1.As indicated above, on that date, Section 66A was inserted in Finance Act, 1994.

11.Having said so, clearly, the Appellant/ Assessee could only have either instituted a suit, albeit, within the period of limitation or, filed a writ petition to ventilate its grievance.

11.1.Concededly, the Appellant/Assessee, did neither and, instead, filed application under Section 11B of the Central Excise Act, 1944.

12.Thus, in our view, ultimately, the Tribunal came to the correct conclusion and therefore, no interference, is called for.

13.In view of our discussion above, Question No.(i) is answered in favour of the Revenue, for its conclusion, subject to caveat set forth above with regard to its observation that the levy could be construed without authority of law but not unconstitutional.

13.1.In so far as, Question No.(ii) is concerned, it is answered against the Assessee and in favour of the Revenue.

13.2.As regards, Question No.(iii), in which, there is a reference to the judgment of the Gujarat High Court in the matter of : Binani Cement Vs. Union of India reported in 2013 (288) ELT 193 (Guj.) - that judgment, in our opinion, would have no application to the instant case, as in that matter, the Gujarat High Court was dealing with a writ petition. Clearly, the Tribunal, in the instant case, was exercising powers, as a creature of the statute and therefore, could not have granted any relief to the Appellant/ Assessee, having regard to the nature of its jurisdiction. Therefore, Question No.(iii), will also have to be answered against the Assessee and in favour of the Revenue.

14.Therefore, while we are of the opinion that no relief can be granted to the Appellant/ Assessee, in view of the jurisdiction that we are presently invested with, it will be open to the Appellant/ Assessee, to take recourse to any other remedy, that may be available to it in law, to seek relief.

15.We are sure, the concerned Court will take a view in the matter, after hearing both sides and after having regard to the position in law, as regards the relief claimed by the Assessee.

16.The appeal is accordingly, dismissed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Customs, Excise and Service Tax Appellate Tribunal,
Haddows Road, Shastri Bhawan Annexe 1st Floor
Chennai - 600 006.

2.The Commissioner of Service Tax
Newry Towers, Anna Nagar
Chennai - 600 040.

+1cc to Mr.N.Viswanathan, Advocate, S.R.No.25210
+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.25493

C.M.A.No.1403 of 2015

SS(CO)
RS(20/06/2017)