

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**STA-31 of 2015
DATE OF DECISION:23.01.2017**

**COMMISSIONER CENTRAL EXCISE COMMISSIONERATE,
CHANDIGARH-I**

... Appellant

V/S

M/S IND. SWIFT LANDS LTD.

... Respondent

**CORAM:HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL**

Present: Mr. Ish Puneet Singh, Advocate
for the appellant.

Mr. Surjeet Bhadu, Advocate
for the respondent.

S.J. VAZIFDAR, C.J. (ORAL)

This is an appeal under Section 35(G) of the Central Excise Act, 1944. According to the appellant, the following substantial questions of law arise:-

- (i) Whether the Judgment and order passed by the Ld. CESTAT is proper and legal?
- (ii) Whether the CESTAT was correct in allowing the Appeal of the Respondent contrary to the ground of limitation under the provisions of Section 11 B of the Central Excise Act, 1944 as made applicable to the service tax matters?
- (iii) Whether the Tribunal is correct in holding that the extended period of limitation is not invocable in terms of provisions of law as well as instructions issued by the CBEC?

- (iv) Whether the Tribunal is correct not to consider the theory of unjust enrichment?

2. Question (i) is merely formal. Question (iii) does not arise. Question (iv) has been decided in favour of the respondent/assessee on facts and the same, therefore, does not raise a substantial question of law. The appeal is, therefore, admitted only in respect of Question (ii).

3. Re. Question (ii)

Between June, 2006 and July 2008, the assessee paid various amounts which the Tribunal held was under protest. The correct name of the assessee is M/s Ind Swift Lands Limited and the assessee carries on business as a developer. In the course of the business, it inter alia constructs premises and sells the same. The assessee's case was that it entered into agreements with purchasers. These were agreements to sell and not agreements of sale. It further contends that agreements of sale/conveyances were executed only after the occupation certificates in respect of the premises were issued by the authority concerned.

4. According to the appellant, the authorities under the Act, pressurized it to make payment of service tax under the Finance Act, 1994 despite the fact that service tax was not payable. By a letter dated 07.06.2006, the appellant informed the Assistant Commissioner, Central Board of Excise and Customs that it enters into agreements with the prospective buyers for the sale of flats in a residential complex at any stage of the construction or even prior thereto and that the purchasers make payment linked to the stage of construction. It further stated that it was not liable to pay service tax but that the revenue authorities were pressurizing it to do so. The letter concludes by

stating that the assessee was therefore depositing service tax “under the pressure of the Department”. By another letter also dated 07.06.2006 addressed to the Chairman of the Central Board of Excise and Customs, the assessee inter alia repeated these contentions. The letter dealt with the provisions of the Finance Act and stated reasons why it was not liable to pay service tax. The assessee requested that the issue of taxability of the transactions for service tax be clarified.

5. As the clarification had not been received, the assessee, probably out of an abundant caution, filed an application for refund on 05.09.2008. The application is neither annexed with the papers nor produced before us but we will presume that it was stated to be under Section 11 B of the Central Excise Act.

6. The Assistant Commissioner by a notice dated 19.01.2009 called upon the assessee to show cause within 30 days as to why its application for refund ought not to be rejected. The notice inter alia referred to Section 11 B stating that the claim for refund is liable to be rejected as it was filed beyond the period of one year from the date on which the amounts were paid.

7. Thereafter, the Central Board of Excise and Customs issued circular No.108/2/2009-S.T., dated 29.01.2009. Paragraph 3 thereof, reads as under:-

“3. The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developolpers and the ultimate owner is in the nature of ‘agreement to sell’. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It

is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax."

8. Two things must be mentioned at this stage. Firstly, the Department never contended that the application was not maintainable under Section 11 B. Secondly, the finding that service tax is not payable by the assessee, is not challenged. These issues were not raised before the Tribunal. Nor were they raised before us as is evident from the questions of law raised in the appeal. We, therefore, proceed on the basis that the assessee is not liable to service tax under the Act and on the basis that the application for refund under Section 11 B was maintainable. We hasten to clarify however, that we do not express any view especially as regards the respondents' liability to pay service tax.

9. The only issue as regards the question under consideration is whether the application for refund was barred by limitation under Section 11 B(1) of the Central Excise Act, 1944 which reads as under:-

“(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty and interest if any, paid on such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991(40 of 1991), such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act:

Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.”

10. The second proviso furnishes a complete answer in favour of the assessee. It states that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty, has been paid under protest. Even

assuming that the application for refund of amounts paid in such circumstances, is to be made under Section 11 B(1), in the present case the application would not be barred by limitation as the amounts were paid under protest. The period of limitation, if any, therefore, would clearly be inapplicable to the assessee. It was not contended before us that any other period of limitation applies and that under such a provision, the claim would be barred nevertheless. An act, including a payment can be made under protest in several ways. For the act to be under protest, it is not necessary that it be accompanied by the very words “under protest”. Whether an act is performed under protest or not must be determined on the basis on which it is performed. If the conduct indicates that it is not voluntary and is done out of compulsion it is under protest even within the meaning of these words in the second Proviso to section 118 (1) of the Act which we will refer to shortly.

11. The Tribunal by the impugned order held that the petitioner made the payments under protest. We see no reason to take a different view. A conjoint reading of the letters establishes that the payments were made under protest. If the payments were made voluntarily and without reservation the assessee would not have addressed either of the letters dated 07.06.2006. The fact that by the letters the assessee contended that it was not liable to pay the tax, sought a clarification and protested about it being required to pay the amount under pressure from the Department indicates that the assessee made the payments under protest. The nature of the contents of the letter further establishes the same. The assessee referred to the provisions of law, analysed the same and expressly contended that it was not liable to service tax. In that view of the matter, it cannot be said that the payments were made voluntarily and without protest.

12. Question (ii) is therefore, answered in the affirmative in favour of the assessee.

13. Re. Question (iv)

As we mentioned earlier, this question does not raise a substantial question of law. The Tribunal observed that the assessee had written letters to the prospective purchasers that the price agreed was not inclusive of service tax and that the assessee was paying the same itself. The Tribunal further noted that the letter also stated that the liability of service tax, if any, would be paid by the purchasers along with the agreed price of the flat. In other words, the purchasers' liability to pay tax was contingent upon the assessee's liability to do so. This is a pure question of fact. It does not raise any question of law.

14. The appeal is accordingly dismissed.

(S.J. VAZIFDAR)
CHIEF JUSTICE

(ANUPINDER SINGH GREWAL)
JUDGE

23.01.2017
SwarnjitS

Whether speaking/reasoned	Yes
Whether reportable	Yes