IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 11.06.2018
JUDGMENT PRONOUNCED ON : 28.06.2018

CORAM:

THE HON'BLE MR. JUSTICE S.MANIKUMAR
and
THE HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

C.M.A.No.601 of 2018

M/s.3E Infotech,
11 B/1, 2nd Floor, New Street,
Parvathipuram, Nagercoil,
Kanyakumari - 629 003. ... Appellant

Vs.

Commissioner of Central Excise (Appeals-I),
Lal Bahadur Shastri Marg,
C.R.Building, Madurai - 625 002. ... Respondents

PRAYER: Civil Miscellaneous Appeal has been filed under Section 35G of the Central Excise Act, against the Final Order No.42618 of 2017, dated 27.10.2017, on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.P.Ayyamperumal

For Respondent: Mr.G.M.Syed Nurullah Sheriff

J U D G M E N T

SUBRAMONIUM PRASAD, J.

Instant Civil Miscellaneous Appeal is filed against the Final Order No.42618 of 2017, dated 27.10.2017, on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

2. Briefly stated, the facts leading to this appeal are follows: The appellant Assessee renders export services from Parvathipuram Nagercoil to its client Alpin Management Partners, USA, and in the process paid a total sum of Rs.9,72,458/- as service tax during the financial year 2015-16. It may be noted that of this amount a sum of Rs.4,39,683/- was paid on 07.04.2015.

3. After making the payment, the appellant realised that under Rule 6A of the Service Tax Rules, inserted w.e.f. 01.07.2012, the appellant did not have a liability to pay service tax. After realising this error, the appellant on

30.06.2016 made a representation to the Assistant Commissioner of Central Excise (service tax) Tirunelveli Division, for the refund of this tax paid by him, which was in excess of his liability.

4. While dealing with the representation of the Assessee, Assistant Commissioner, issued a show cause notice as to why the claim of refund of the Assessee as far as the sum of Rs.4,39,683/- was concerned not be disallowed. The Assistant Commissioner was of the view that under Section 11B of the Central Excise Act, the application for refund must be made within a period of one year from the relevant date. The Assistant Commissioner was of the view that the claim of refund by the Assessee insofar as it related to Rs.4,39,683/- was barred by limitation, as the application for refund was made after one year from the relevant date.

5. In the refund order, the Assistant Commissioner allowed the refund of Rs.5,32,772/- and disallowed the refund claim of Rs.4,39,683/- on the ground that it was barred by limitation.

6. Aggrieved by this order, the Assessee filed an appeal to the Commissioner of Central Excise (Appeals-I), who affirmed the order of the Assistant Commissioner that the claim of the Assessee was barred by limitation, and dismissed the appeal.

7. The Assessee approached the Customs Excise & Service Tax Appellant Tribunal, against the order of the Commissioner. The Tribunal took the view, that it had an obligation to act within the four corners of law, and found no justification to condone the delay in making the application for making a refund, and rejected the appeal.

8. The present appeal lies from the order of the Appellate Tribunal. We have heard the learned counsel for the Assessee and the State. The issue, which arises for consideration in this case, whether the provisions of Section 11B of the Central Excise Act would be applicable to claim of refund made by an Assessee when the tax has been paid under mistake of law. In this case, indisputably, there was no liability on the petitioner to pay service tax. The Supreme Court of India, in the case of Union of India Vs. ITC Ltd. reported in (1993) Supp. IV SCC 326, while dealing with the question of refund of excess excise paid held:-

> 8. In Shri Vallabh Glass Works Ltd. V. Union of India, this Court, while examining the question as to what is the point of time from which the limitation should be deemed to commence observed that relief in respect of payments made beyond the period of three years may not be granted from the date of filing of the petition, taking into consideration the

date when the mistake came to be known to the party concerned. Just as an assessee cannot be permitted to evade payment of rightful tax, the authority which recovers tax without any authority of law cannot be permitted to retain the amount, merely because the tax payer was not aware at that time that the recovery being made was without any authority of law. In such cases, there is an obligation on the part of the authority to refund the excess tax recovered to the party, subject of course to the statutory provisions dealing with the refund.

9. We are, therefore, of the opinion that the High Court, while disposing of the writ petition under Article 226 of the Constitution of India, was perfectly justified in holding that the bar of limitation which had been put against the respondent by the Collect of Central Excise (Appeals) to deny them the refund for the period September 1, 1970 to May 28,1971, and June 1, 1971 to February 19, 1972 was not proper as admittedly the respondent had approached the Assistant Collector Excise soon after coming to know of the judgment in Voltas case and the assessee was not guilty of any laches to claim refund.

9. In the above cited case, the Supreme Court stated that the Assessee's claim to refund would not be disallowed solely because it seemed barred by limitation. Since the Assessee in that case made the claim for refund shortly after learning about their entitlement for the same, it would not be just to hold that such claim is hit by laches.

10. The High Court of Gujarat in Oil and Natural Gas Corporation Ltd., Vs. Union of India, reported in 2017 (354) E.L.T. 577 (Guj.) relied on another judgment of the Gujarat High Court in Joshi Technologies International, INC-India Projects Vs. Union of India and quoted the relevant paragraph, which reads as under:-

"Merely because the provisions of the Central Excise Act, 1944 and the rules framed thereunder for collection and refund viz., the machinery provisions have been incorporated in the OID Act for collection and refund of the cess levied thereunder, it cannot be inferred that the Oil Cess imposed under the provisions of the OID Act assumes the character of central excise duty. The finding recorded by the adjudicating authority that the Oil Cess is in the nature of excise duty, is erroneous and contrary to the law laid down by this court in Commissioner v. Sahakari Khand Udyog Mandli Ltd. (supra).

In the Circular dated 7th January, 2014, reference to sugar cess and tea cess levied under the Sugar Cess Act, 1982, and the Tea Act, 1953, respectively, is merely illustrative in nature and what is meant by the circular is that the cesses which are collected by the Department of Revenue, but levied under an Act which is administered by different Department are not chargeable to Education Cess and Secondary and Higher Secondary Cess chargeable under the provisions of the Finance Acts, 2004 and 2007, respectively.

Education Cess and Secondary and Higher Secondary Education Cess being cesses levied at a percentage of the aggregate of all duties of excise, the basic requirement for levy thereof is the existence of excise duty. In the present case Oil Cess is not a duty of excise and hence, the basic requirement of levy of such cesses is not satisfied. Furthermore, for the purpose of levy of Education Cess and Secondary and Higher Secondary Education Cess, two other conditions precedent, are required to be satisfied, viz., (i) that the duty of excise should be levied by the Central Government in the Ministry of Finance (Department of Revenue); and (ii) the duty of excise should be collected by the Central Government in the Ministry of Finance (Department of Revenue). In the present case, since the machinery provisions of the Central Excise Act, 1944 and the rules framed thereunder have been incorporated in the OID Act, the second condition precedent is satisfied, viz. that the cess is collected by the Central Government in the Ministry of Finance (Department of Revenue); however, the first condition with regard to levy of such duty of excise by the Central Government in the Ministry of Finance (Department of Revenue) is not satisfied inasmuch as the Oil Cess under the OID Act is levied by the Ministry of Petroleum and Natural Gas. In the aforesaid premises, the requirements of section 93 of the Finance Act, 2004 and section 138 of the Finance Act, 2007 are not satisfied in the present case, and consequently, the said provisions have no applicability to the facts of the present case. The petitioner, therefore, cannot be said to have been liable to pay Education Cess and Secondary and Higher Secondary Education Cess under the above provisions.

In the facts of the present case, the refund is claimed on the ground that the amount was paid under a mistake of law and such claim being outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. The petitioner was, therefore, justified in filing the present petition before this court against the order passed by the adjudicating authority rejecting its claim for refund of the amount paid under a mistake.

Since Oil Cess is not a duty of excise, the amount paid by the petitioner by way of Education Cess and Secondary and Higher Secondary Education Cess, cannot in any manner be said to be a duty of excise inasmuch as what was paid by the petitioner was not a duty of excise calculated on the aggregate of all the duties of excise as envisaged under the provisions of section 93 of the Finance Act, 2004 and section 138 of the Finance Act, 2007. Thus, the amount paid by the petitioner would not take the character of Education Cess and Secondary and Higher Secondary Education Cess but is simply an amount paid under a mistake of law. The provisions of section 11B of the Central Excise Act, 1944 would, therefore, not be applicable to an application seeking refund thereof. The petitioner was therefore, wholly justified in making the application for refund under a mistake of law and not under section 11B of the Central Excise Act, 1944.

Since the provisions of section 11B of the Act are not applicable to the claim of refund made by the petitioner, the limitation prescribed under the said provision would also not be applicable and the general provisions under the Limitation Act, 1963 would be applicable. Section 17 of the Limitation Act inter alia provides that when a suit or application is for relief from the consequences of a mistake, the period of limitation would not begin to run until the plaintiff or applicant has discovered the mistake, or could, with reasonable diligence, have discovered it. Since the period of limitation begins to run only from the time when the applicant comes to know of the mistake, the application made by the petitioner was well within the prescribed period of limitation. Moreover, since the very retention of the Education Cess and Secondary and Higher Secondary Education Cess by the respondents is without authority of law, in the light of the decision of this court in Swastik Sanitarywares Ltd. v. Union of India (supra), the question of applying the limitation prescribed under section 11B of the CE Act would not arise.

Even in case where any amount is paid by way of self assessment, in the event any amount has been paid by mistake or through ignorance, it is always open to the assessee to bring it to the notice of the authority concerned and claim refund of the amount wrongly paid. The authority concerned is also duty bound to refund such amount as retention of such amount would be hit by Article 265 of the Constitution of India which mandates that no tax shall be levied or collected except by authority of law. Since the Education Cess and Secondary and Higher Secondary Education Cess collected from the petitioner is not backed by any authority of law, in view of the provisions of Article 265 of the Constitution, the respondents have no authority to retain the same.

If the adjudicating authority was not satisfied with the Chartered Accountant's certificate and the other material produced by the petitioner, he could have called upon the petitioner to produce further documentary evidence in support of its claim that it had not passed on the incidence of duty to the purchaser. However, without affording a reasonable opportunity to the petitioner to produce documentary evidence in support of its claim that there was no unjust enrichment, the adjudicating authority was not justified in holding that there was unjust enrichment. Therefore, the finding that the petitioner's claim is hit by unjust enrichment cannot be legally sustained.

11. A similar view has been taken by the Bombay High Court in the case of Parijat Construction Vs. Commissioner Excise, Nashik, reported in 2018(359) ELT 113 (Bom), where the Bombay High Court has held as under:-

4. We are of the view that the issue as to whether limitation prescribed under Section 11B of the said Act applies to a refund claimed in respect of service tax paid under a mistake of law is no longer res integra. The two decisions of the Division Bench of this Court in Hindustan Cocoa (supra) and Commissioner of Central Excise, Nagpur v. M/s. SGR Infratech Ltd. (supra) are squarely applicable to the facts of the present case.

5. Both decisions have held the limitation prescribed under Section 11B of the said Act to be not applicable to refund claims for service tax paid under a mistake of law. The decision of the Supreme Court in the case of Collector of C.E., Chandigarh v. Doaba Co-Operative Sugar Mills (supra) relied upon by the Appellate Tribunal has in applying Section 11B, limitation made an exception in case of refund claims where the payment of duty was under a mistake of law. We are of the view that the impugned order is erroneous in that it applies the limitation prescribed under Section 11B of the Act to the present case were admittedly appellant had paid a Service Tax on Commercial or Industrial Construction Service even though such service is not leviable to service tax. We are of the view that the decisions relied upon by the Appellate Tribunal do not support the case of the respondent in rejecting the refund claim on the ground that it was barred by limitation. We are, therefore, of the view that the impugned order is unsustainable. We accordingly allow the present appeals and quash and set aside the impugned order, insofar as it is against the appellant in both appeals. We fully allow refund of Rs. 8,99,962/- preferred by the appellant. We direct that the respondent shall refund the amount of Rs.8,99,962/- to the appellant within a period of three months. There shall be no order as to costs.

12. Further, the claim of the respondent in refusing to return the amount would go against the mandate of Article 265 of the Constitution of India, which provides that no tax shall be levied or collected except by authority of law.

13. On an analysis of the precedents cited above, we are of the opinion, that when service tax is paid by mistake a claim for refund cannot be barred by limitation, merely because the period of limitation under Section 11B had expired. Such a position would be contrary to the law laid down by the Hon'ble Apex Court, and therefore we have no hesitation in holding that the claim of the Assessee for a sum of Rs.4,39,683/- cannot be barred by limitation, and ought to be refunded.

14. There is no doubt in our minds, that if the Revenue is allowed to keep the excess service tax paid, it would not be proper, and against the tenets of Article 265 of the Constitution of India. On the facts and circumstances of this case, we deem it appropriate to pass the following directions:-

a) The Application under Section 11B cannot be rejected on the ground that is bared by limitation, provided for under Section.

b) The claim for return of money must be considered by the authorities.

15. This Civil Miscellaneous Appeal is ordered accordingly. There shall be no order as to costs.

Sd/-
Assistant Registrar(CS-v)

//True Copy//

Sub Assistant Registrar

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To

1.The Commissioner Customs,
Excise & Service Tax Appellate Tribunal,
No.26, Shastri Bhavan, Annex Building,
Haddows Road, Chennai - 600 006.

2. The Commissioner of Central Excise (Appeals-I),
Lal Bahadur Shastri Marg,
C.R.Building, Madurai - 625 002.

+ 1 cc to M/s. P. Ayyamperumal, Advocate Sr.41325
+ 1 cc to MR. G.M. Syed Nurullah Sheriff, Advocate Sr.41307

C.M.A.No.601 of 2018

MP(CO)
EU(06/09/2018)