

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.02.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

Writ Petition No.29636 of 2017

BNP Paribas Global Securities Operations Private Limited
Rep by its Chief Administrative Officer
No.8, Ekkaduthangal Road, Guindy
Chennai - 600 032. ...Petitioner

Vs.

The Assistant Commissioner of Service Tax
Office of the Commissioner Goods and Service Tax
Chennai - South Commissionerate
692, M.H.U.Complex, Nandanam
Chennai - 600 035. ... Respondent

Prayer : Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for records in C.No.IV/16/172/2017-R&R LC/C.No.IV/16/213/2017 SV0301 and to quash the Show Cause Notice No.10/2017 dated 19.10.2017 issued by the respondent and to further direct the respondent to refund the amount due to the petitioner company in terms of Orders in Appeal No's 415 & 416 of 2015 dated 31.12.2015, order in Appeal No.24 of 2016 dated 18.12.2016 and orders in Appeal No's. 51 & 52 of 2016 dated 26.04.2016 passed by the Commissioner (Appeals) along with interest.

For Petitioner : Mr.Joseph Prabakar

For Respondent : Mrs.Aparna Nandakumar
Standing Panel Counsel

O R D E R

Heard Mr.Joseph Prabakar, learned counsel for the petitioner and Mrs.Aparna Nandakumar, learned Senior Panel Counsel appearing on behalf of the respondent.

2.The petitioner has filed this writ petition challenging a show cause notice issued by the respondent dated 19.10.2017 and directing the respondent to refund the amount due to the petitioner.

3. Mrs. Aparna Nandakumar, learned Senior Standing Counsel for the Revenue raised a preliminary objection with regard to the maintainability of the petition, contending that the impugned proceedings being a show cause notice, the petitioner should be directed to submit a reply to the notice and participate in the adjudication process. At the first blush, the contention advanced by the learned Senior Standing Counsel appears to be an acceptable proposition, but, on a closure scrutiny of the factual position of the instant case, has convinced me to entertain the writ petition as the petitioner's claim for refund is sought to be denied, on the ground that it is barred by limitation.

4. Therefore, what is required to be seen as to whether the proposal made by the respondent in the impugned show cause notice to hold that the petitioner's refund claims is barred by limitation is just and proper. Being the only issue, this will not be a bar and the Court would be well justified in exercising its jurisdiction under Article 226 of the Constitution of India.

5. The petitioner filed an application for refund dated 20.08.2013 under Rule 5 of the CENVAT Credit Rules, 2004. The various heads under which the refunds were claimed are mentioned in the application and in the appropriate format supported by Auditor's Certificate. The respondent took up the case for adjudication and passed Order-in-Original dated 30.10.2015. The Adjudicating Authority considered the issue as to whether the application filed for refund was within the time prescribed under Section 11(B) of the Central Excise Act, 1944. The authority recorded that the exports pertaining to export invoices raised on or before 06.09.2012 is hit by time bar. So far as the export invoices raised after 06.09.2012, the respondent found them to be well within the time limit as prescribed under Section 11(B)(a) of the Central Excise Act, 1944. Thus the Original Adjudicating Authority found the application for refund in respect of the export invoices raised after 06.09.2012 were well within the period of limitation. However, when the authority processed the refund claim which was for Rs.71,39,495/- held that the sanctionable amount is only Rs.42,06,199/-. The reason being that one of the premises in which the petitioner was carrying on business was not registered with the Department. The petitioner preferred appeals against the said order and the appellate authority by order dated 31.12.2015 allowed the petitioner's appeal and set aside the order rejecting the part of the refund claim on the ground of the non-registration of the premises; upholding the findings with regard to the disallowance of CENVAT Credit in respect of the air travel Agent service and car parking charges and set aside the order, rejecting part of their refund claim on the ground of limitation.

6.The revenue preferred appeal in respect of one of the orders passed by the Commissioner of Appeals in CMA No.3493 of 2017 which was dismissed by the Hon'ble Division Bench by judgment dated 22.12.2017. Thus the petitioner's entitlement for refund on the amounts claimed by them was held to be sustainable except for the dis-allowance in respect of two issues. At this stage of the matter, the impugned show cause notice was issued stating that the application filed by the petitioner for refund dated 27.04.2017 after the order was passed by the Commissioner of Appeal is barred by limitation and to that said effect the proposal has been made in the impugned show cause notice to reject the claim of the petitioner.

7.The revenue's case is that as per Section 11(B) of the Central Excise Act, 1944, the refund claim has to be filed within one (1) year from the relevant date and the relevant date in the case of the petitioner is the date of order passed by the appellate authority and if such date is reckoned, the application for refund dated 27.04.2017 is filed beyond the period of one year as the order passed by the Appellate Authority are dated 31.12.2015, 18.02.2016 and 26.04.2016.

8.The learned Senior Standing Counsel appearing for the revenue referred to Section 11(B)(1) Explanation (B)(ec) of the Central Excise Act, 1944 and submitted that in the case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction will be the relevant for the purpose of calculating the period of one year.

9.Therefore, it is submitted that the application dated 27.04.2017 is proposed to be rejected on the ground it is time barred and it is the duty of the petitioner to respond to the show cause notice. The respondent miserably failed to take note of the fact that the claim for refund is not as a result of a judgment or order or direction of a Court or order of a Tribunal or an authority but it is on account of a notification issued by the Central Board being notification No.27/2012 CE(NT) dated 18.06.2012. This notification deals with refund of CENVAT credit under Rule 5 of the CCR, 2004 and it is not only prescribes the safeguards, conditions and limitations, it also prescribes the procedure for filing the refund claim under Clause 3 of the notification and in terms of clause 3(b) of the notification the application for refund in form A along with the documents specified therein and the enclosures relating to the quarter for which the refund is claimed, shall be filed by the claimant before the expiry of the period specified under Section 11(B) of the Act. Thus the petitioner filed an application in terms of

the said notification and the adjudicating authority namely, the respondent in paragraph 8 of its order dated 30.10.2015 and found that the export invoices raised after 06.09.2017 are well within the period of limitation as per Section 11(B) of the Act. Therefore, it has to be seen as to whether the explanation under Section 11(B)(1) has to be referred to consider whether the petitioner's application is within the time or not.

10. In my considered opinion, it may not be necessary to refer to the explanation (B)(ec) as explanation (B) (a) gives the answer. In terms of Section 83 of the Finance Act several provisions including Section 11(B) of the Central Excise Act, 1944 would apply to the proceedings under the Finance Act. Therefore, wherever appropriate the word services should be substituted while reading the definition of relevant date for better appreciation the provisions are quoted herein below:-

11B. Claim for refund of duty.

(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months¹ from the relevant date⁴ in such form 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 in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person:

(B) "relevant date" means,-

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods,-

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

11. Since the nature of services done by the petitioner is export of services, it would be appropriate to read the definition of "relevant date" as per the above explanation in the following manner.

12."Relevant date" means,

in the case of export of services out of India, where a refund of CENVAT paid is available in respect of the export of services or as the case may be, the excisable material used in the export of services shall be the relevant date and if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or if it is exported by land, the date on which such goods pass the frontier, or if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India.

13.As noticed above the refund has not accrued to the petitioner on account of any order or judgment but on account of statutory provisions coupled with the notification where input services are used for export of services. Thus, the reliance placed on the explanation (B) (ec) does not render any support to the case of the revenue.

14.As rightly pointed out by the Mr. Joseph Prabakar, learned counsel for the petitioner, the revenue did not file any appeal as against the findings rendered by the respondent in his order dated 30.10.2015 holding part of the applications to be within time. Before the Appellate Authority the petitioner's succeeded that the remaining applications are also within time. The order was confirmed by the Tribunal. Further, appeal to the Division Bench was only on merits of the matter, which was rejected. Therefore, at this point of time, the stand taken by the respondent proposing to reject the petitioner's application for refund is wholly without jurisdiction and erroneous.

15.The learned Senior Standing Counsel appearing for the revenue placed reliance on the decision of the Hon'ble Supreme Court in the case of Union of India and Another Vs. Kirloskar Pneumatic Company Limited reported in (1996) 4 SCC 453 for the proposition that if the statute prescribes period of limitation High Court cannot direct the Customs Authorities to act contrary to the mandatory provision. This said decision can have no appreciation to the facts of the present case as in the said case the High Court directed the Customs Authority not to reject the refund application as time barred. No such contingencies arises in the instant case. Therefore, the said decision is distinguishable on facts. Thus, for all the above reasons, I hold that the impugned show cause notice is without jurisdiction

and unsustainable. Accordingly, the writ petition is allowed and the impugned notice is quashed and the respondent is directed to process and effect refund to the petitioner in accordance with law within a period of eight (8) weeks from the date of receipt of a copy of this order. No costs.

Sd/-
Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

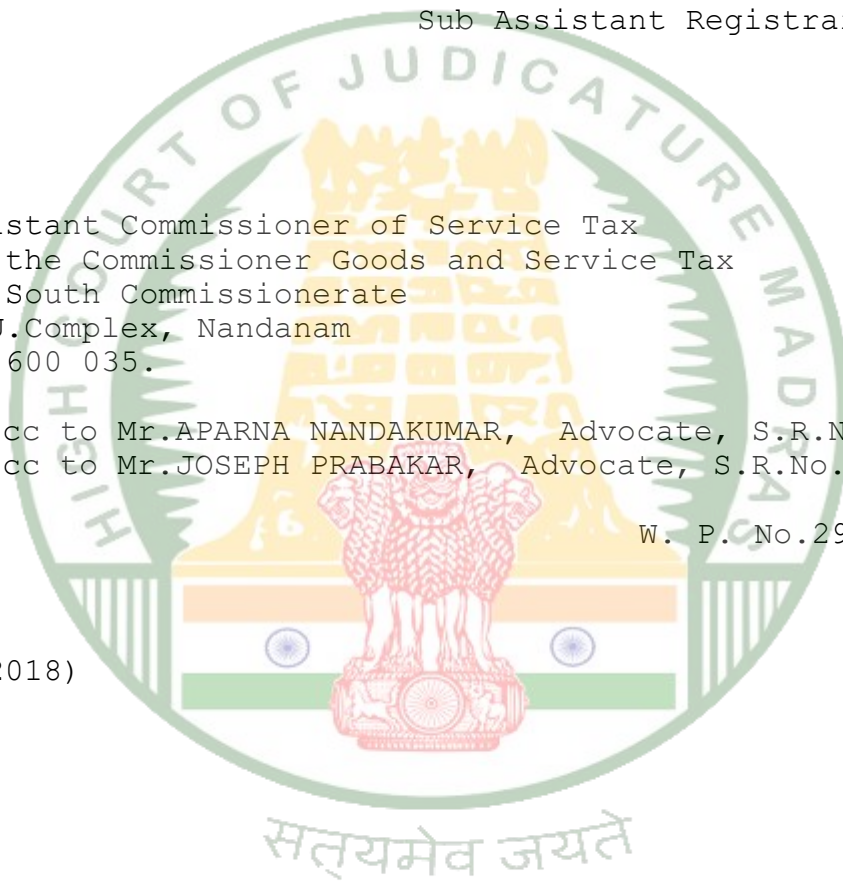
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To

1.The Assistant Commissioner of Service Tax
Office of the Commissioner Goods and Service Tax
Chennai - South Commissionerate
692, M.H.U.Complex, Nandanam
Chennai - 600 035.

+lcc to Mr.APARNA NANDAKUMAR, Advocate, S.R.No.7795
+lcc to Mr.JOSEPH PRABAKAR, Advocate, S.R.No.8010

W. P. No.29636 of 2017

TR(22/02/2018)



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