IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.09.2019

CORAM

THE HONOURABLE Dr. JUSTICE ANITA SUMANTH

W.P.No.23664 of 2017

M/s.Enmas Andritz Pvt. Ltd.
4th Floor, Guna Building Annexe,
No.443, Anna Salai, Teynampet,
Chennai-600 040.
Rep. by its Director
N.Soundrapandian .. Petitioner

Vs.

1.The Assistant Commissioner of Service Tax,
Chennai II Commissionerate,
Teynampet, Chennai - 600 018.

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

Prayer:- Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Mandamus, to direct the respondents herein to refund the sum of Rs.22,79,812/- in cash to the petitioner company being the service tax paid and collected under mistake of law, as the very levy and collection being contrary to Art.265 of the Constitution and thus making it unconstitutional as has already been held by the division bench of this Court in CMA.No.1403 of 2015 dated 25.04.2017 holding that the levy made against the petitioner is to be construed as one without the authority of law and that the tax authorities have acted beyond their jurisdiction.

For Petitioner : Mr.N.Viswanathan
For Respondents : Mr.K.Magesh
Standing Counsel

O R D E R

The petitioner seeks a mandamus directing the respondents to refund a sum of Rs.22,79,812/-. The petitioner is a service provider registered under the category of Consulting Engineering Services. In the course of its business activities, it received certain services in the realm of testing, valuation and consulting engineering from abroad, stretching between the period 01.04.2005 to 17.04.2005. Tax of a sum of Rs.22,79,812/- was remitted by the petitioner in the light of Rule 2(1)(d)(iv) of the Service Tax Rules, 1994, extracted below:

'in relation to any taxable service provided by a person who is a non-resident or is from outside India, dose not have any office in India, the person receiving taxable service in India'

2.The virus of the aforesaid Rule was challenged by the Indian National Ship Owners Association, before the Bombay High Court. The main contention raised by the petitioner therein was two fold (i) that the imposition of service tax by way of a Rule without there being a corresponding statutory provision backing the same is impermissible and without the authority of law and (ii) the charging provision, Sections 65 (105) and 66 of Finance Act, 1994 authorized the levy of service tax only upon the service provider and not upon the service recipient as was sought to be done by Rule 2(1)(d)(iv). The challenge before the Court was set out in paragraph-1 of the decision of the Division Bench in Indian National Ship Owners Association vs. Union of India, (2009 (13) STR 235 (Bom)), as follows:

'By this Petition the Petitioners challenge the constitutional validity of the following:-

(i) Section 66A of the Finance Act, 19941; (hereinafter referred to as the "Act for the sake of brevity), which has been introduced with effect from 18th April, 2006;

(ii) An explanation to Section 65(105) of the Act, which was in force between 16th June, 2005 and 17th April, 2006; and

(iii) Rule 2(i)(d)(iv) of the Service Tax Rules, 1994 inserted with effect from 16th August, 2002;'

3.In conclusion, the Bench, at paragraph-5 held that it was only after enactment of Section 66(A) dealing with the taxability of services rendered abroad by a non-resident Indian in the hands of an Indian recipient that the Indian recipient would be deemed to be a service provider and not prior thereto. Section 66(A) was enacted only on 18.04.2006 and in the absence of a charging provision prior thereto, there could be no imposition of tax by way of a Rule. The validity of the Rule during the period 2002 to 18.04.2006 was struck down holding that the respondents had no authority to levy service tax upon recipients of services for non-resident Indians prior to 18.04.2006.

4.This decision was carried in appeal before the Supreme Court that confirmed the same on 14.12.2009. The law thus stood settled on 14.12.2009, to the effect that there could be no liability fastened upon a service recipient, who had received services from non-resident service providers, prior to introduction of Section 66(A).

5.The petitioner before me consequently sought refund of the tax paid by it in terms of Rule 2(i)(d)(iv) which claim was rejected on 13.07.2010 by the original authority. The order was reversed in first appeal by order dated 12.02.2013.

In further appeal by the revenue, the Customs Central Excise and Service Tax Appellate Tribunal (in short 'CESTAT'), by order dated 18.10.2013 reversed the order of the Commissioner (Appeals) making a distinction between a levy that is 'without the authority of law' and one that was 'unconstitutional'.

6.A Civil Miscellaneous Appeal in CMA.No.1403 of 2015 was filed by the petitioner before a Division Bench of this Court that by order dated 25.04.2017, dismissed the same. While observing that the findings of the Tribunal to the effect that the levy was only without the authority of law but not unconstitutional was erroneous, the bench states at paragraphs 9 to 15 as follows:

> '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.
>
> 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 Asessee 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.'

It is as a consequence to the aforesaid order that the petitioner is before this Court by way of the present writ petition.

7.Heard Mr.N.Viswanathan, learned counsel for the petitioner and Mr.K.Magesh, learned Standing Counsel for the respondents.

8.Learned revenue counsel urges that the refund sought is not in line with Section 11-B of the Central Excise Act, 1944 and as such is not liable to be granted.

9.However, where the collection of the tax is itself without the authority of law, then the refund of tax collected thus, is also not bound by the rigour of that law. The provisions of Section 11 B and the rigour/procedure thereof would not be applicable or attracted to the present case. Admittedly, the petitioner has suo motu, complied with the provisions of Rule 2(i)(d)(iv) and having done so, the petitioner should not be expected to suffer on account of compliance. For these reasons, I am of the view that this writ petition should succeed and the amount of tax remitted be refunded to the petitioner within a period of four weeks from date of receipt of a copy of this order.

10.The only fault that perhaps, may be attributed to the petitioner is one of adherence to the rule of law. As the Division Bench has states at paragraph-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'.

11. In the light of the discussion as above, I am of the considered and categoric view that in the light of the order of the Division Benches, this Court as well as the Bombay High Court, the collection of tax in terms of Rule 2(i)(d)(iv) prior to insertion of Section 66(A) is sans the authority of law. The petitioner is, without question, entitled to the refund sought for by it in this regard.

12.There is no prayer for interest in the writ petition. However, the learned counsel for the petitioner would request that interest be granted in the facts and circumstances of the present case. The learned Revenue counsel objects vehemently.

13.I am of the view that the levy of interest would be justified for the period post the judgment of the Supreme Court dated 14.12.2009, confirming the position that the charge under Rule 2(i)(d)(iv) prior to the enactment of Section 66(A) is unconstitutional. Interest is awarded at the rate of 6% per annum from 05.05.2010 till date of payment.

14.This writ petition is allowed in the above terms. No costs.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

vs
To
1.The Assistant Commissioner of Service Tax,
Chennai II Commissionerate,
Teynampet, Chennai - 600 018.

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

+1cc to Mr.K.Magesh , Advocate SR.No. 77358
+1cc to Mr.N.Viswanathan , Advocate SR.No. 77428

W.P.No.23664 of 2017

A.SK(19/12/2019)