



W.P.No.1011 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.08.2024

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.1011 of 2022

Heidelberg India Private Limited,
Represented by its Director
Swaminathan. V

... Petitioner

Vs

The Assistant Commissioner of Goods,
and Service Tax and Central Excise,
Pallavaram Division,
Chennai.

... Respondent

Prayer : Petition is filed under Article 226 of the Constitution of India to issue a Writ of Mandamus, directing the respondent to accept the refund application filed by the petitioner in Form R dated 11.02.2019 and grant the refund along with interest.

For Petitioner : Mr.Harish Bindumadhavan

For Respondent : No Appearance



W.P.No.1011 of 2022

WEB COPY

ORDER

This writ petition has been filed for the Mandamus to direct the respondent to accept the refund application filed by the petitioner in Form R dated 11.02.2019 and grant the refund along with interest.

2. The refund claim pertains to service tax allegedly paid during the Financial Year 2016-17 under the Finance Act, 1994.

3. The petitioner is seeking refund of service tax paid during the Financial Year 2016-2017 under the provisions of Chapter 5 of the Finance Act, 1994.

4. The learned counsel for the petitioner would draw attention to Section 142(3) of the GST Act, 2017, reads as under:-

(3) Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary



WEB COPY



W.P.No.1011 of 2022

contained under the provisions of existing law other than the provisions of sub-section (2) of Section 11B of the Central Excise Act, 1944:

Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse:

Provided further that no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act”.

5. The learned counsel for the petitioner has drawn attention to the decision of the Division Bench of this Court in CMA.No.601 of 2018 in the case of **M/s.3E Infotech, 11 B/1, 2 nd Floor, New Street, Parvathipuram, Nagercoil, Kanyakumari – 629 003. vs. 1. Customs, Excise & Service Tax Appellate Tribunal, No.26, Shastri Bhavan, Annex Building, Haddows Road, Chennai – 600 006 and another**, wherein the court referred to the decision of the Hon’ble Supreme Court in **Union of India vs. ITC Ltd.** 1993(67) ELT 3 (SC) and had held as under:-

“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



W.P.No.1011 of 2022

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”.

6. I have considered the arguments advanced by the learned counsel for the petitioner. Section 83 of the Finance Act, 1994 incorporates provisions of the Central Excise Act, 1944, in relation to service tax as they would apply in relation to duty of excise. Section 83 of the Finance Act, 1994 reads as under : -

“Section 83. Application of certain provisions of Act I of 1944. *

The provisions of the following sections of the Central Excises and Salt Act, 1944, as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:-

9C, 9D, 11, 11B, 2B, 120, 120, 12E, 14, 15, 35F to 350 (both inclusive), 350, 36, 36A, 368, 374, 373, 37C, 37D and 40”.

[Central Excise Act, 1944]

7. Section 11(B) of the Central Excise Act, 1944 is one of the provisions which has been made applicable in relation to service tax under Section 83 of the Finance Act, 1994. Section 11(B) of the Central



W.P.No.1011 of 2022

Excise Act, 1944 have been made applicable in relation to Service tax.

Therefore, under refund claim, of service tax. Under Section 11(B) of the Central Excise Act, 1944, a refund claim has to be made within a period of one year from the “relevant date”.

8. The expression a “relevant date” has also been defined in Explanation to Section 11(B) of the Central Excise Act, 1944. It reads as under:-

(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 in the manufacture of such goods, -

- (1) 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
- (2) if the goods are exported by land, the date on which such goods pass the frontier, or
- (3) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;



WEB COPY



W.P.No.1011 of 2022

- (b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;
- (c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;
- (d) in a case where a manufacturer is required to pay a sum, for certain period, on the basis of rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;
- (e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;]
- (ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5-A, the date of issue of such order;]
- (eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;]
- (ec) in 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;]
- (f) in any other case, the date of payment of duty.]



W.P.No.1011 of 2022

WEB COPY

9. Therefore, a refund of service tax paid in excess if any, has to be made within a period of one year from the relevant date as specified under Section 11 B of the Central Excise Act, 1994 as it would apply to a refund of Central Excise duty under Section 11B of the Central Excise Act, 1944.

10. The decision of the Hon'ble Supreme Court in ***Union of India vs. ITC Ltd.***, 1993(67)ELT 3(SC) which was relied by Division Bench of this Court in CMA.No.601 of 2018 in the case of ***M/s.3E Infotech, 11 B/1, 2nd Floor, New Street, Parvathipuram, Nagercoil, Kanyakumari – 629 003. vs. 1. Customs, Excise & Service Tax Appellate Tribunal, No.26, Shastri Bhavan, Annex Building, Haddows Road, Chennai – 600 006 and another***, is primarily an authority for “unjust enrichment” under Section 11B of the Central Excise Act, 1994.

11. The said decision incidentally touched on Limitation in para 13 to 15. The decision of the Hon'ble Supreme Court in ***Union of India vs. ITC Ltd.***, 1993(67)ELT 3(SC) has been diluted by the Hon'ble Supreme Court in ***Mafatlal Industries Ltd. v. Union of India***, (1997) 5



W.P.No.1011 of 2022

SCC 536 insofar as limitation. In para 13 to 15, the Hon'ble Supreme Court in *Union of India vs. ITC Ltd.*, 1993(67)ELT 3(SC) observed as under :-

13. Again, in paragraph 3 of the stay application (CMP No. 24970 of 1982), it has been inter alia stated:

It may be further stated that the respondent will not be in any manner prejudiced since they have already realised from their customers the excise duty on the manufactured goods. The balance of convenience would also lie in favour of a stay of the judgment of the Delhi High Court pending disposal of the appeal....”

The respondent did not controvert the above averments. Even otherwise, the appellants cannot be refused permission to raise a plea relating to the interpretation of the amended provisions of Section 11-B of the Act, which came into force only during the pendency of the appeal. A plea which relates to the interpretation of a statutory provision which comes into existence during the pendency of an appeal under Article 136 can always be permitted to be raised during the hearing to do complete justice between the parties. Such a plea relating to interpretation of a statutory provision is essentially a question of law and can be allowed to be raised for the first time during the hearing of the appeal and that is why on the oral prayer of learned counsel for the appellants we permitted that plea to be raised. Insofar as the factual aspect of the enquiry is concerned, both for purposes of Sections 11-B(2) and 12-B of the Act, this Court has itself granted an opportunity to the respondent to rebut the presumption which can be raised under Section 12-B of the Act. The objection raised by the respondent, thus, has no force or merit.



W.P.No.1011 of 2022

14. Section 11-B of the Act regulating refund of Central Excise Duty has undergone a vast change after its amendment by the Central Excises and Customs Laws (Amendment) Act 1991 (No. 40 of 1991) with effect from September 20, 1991. Sub-section (1) of Section 11-B, after its amendment, provides that 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 months from the relevant date in a prescribed form supported by documentary and other evidence intended 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 has not been passed on by him to any other person. The first proviso to the sub-section lays down that where an application for refund has been made before the commencement of Act No. 40 of 1991 such application shall be deemed to have been made under the amended provisions and shall be dealt with in accordance with the provisions of sub-section (2) as amended. In the second proviso, it is stated that the limitation of six months shall not apply where such duty has been paid under protest. Sub-section (2) of Section 11-B inter alia provides that the Assistant Collector of Central Excise while entertaining the claim for refund of duty may order the refund of the amount of duty paid by the claimant provided he had not passed on the incidence of such duty to any other person. The thrust of the amendment vide Section 11-B(2) of the Act is that the refund of duty paid by the manufacturer can be allowed, if due, only in cases where the assessee has not passed on the incidence of such duty to any other person.

15.Sub-section (3) of the amended Section 11-B provides:



W.P.No.1011 of 2022

“(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).”

12. As mentioned above, the above view was diluted by the Hon'ble Supreme Court in *Mafatlal Industries Ltd. v. Union of India*, (1997) 5 SCC 536 In para 99, the Hon'ble Supreme Court has summarised the position of law as follows:-

108. The discussion in the judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

(i) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff — whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter — by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or



WEB COPY



W.P.No.1011 of 2022

by misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, **such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein.** No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 — and of this Court under Article 32 — cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act do constitute “law” within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. **Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder.** Section 11-B



WEB COPY



W.P.No.1011 of 2022

of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and given effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasise in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal — which is not a departmental organ — but to this Court, which is a civil court.

- (ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception: Where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be reopened on the basis of a decision on



WEB COPY



W.P.No.1011 of 2022

another person's case; this is the ratio of the opinion of Hidayatullah, C.J. in *Tilokchand Motichand* [(1969) 1 SCC 110 : (1969) 2 SCR 824 : AIR 1970 SC 898] and we respectfully agree with it.

Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying clause (c) of sub-section (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

- (iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional



WEB COPY



W.P.No.1011 of 2022

imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

- (iv) It is not open to any person to make a refund claim on the basis of a decision of a court or tribunal rendered in the case of another person. He cannot also claim that the decision of the court/tribunal in another



W.P.No.1011 of 2022

WEB COPY

person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without reopening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well-established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund.

- (v) Article 265 of the Constitution has to be construed in the light of the goal and the ideals set out in the Preamble to the Constitution and in Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes like Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the petitioner-plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.



WEB COPY



W.P.No.1011 of 2022

- vi) Section 72 of the Contract Act is based upon and incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision.
- (vii) While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the petitioner-plaintiff has suffered no real loss or prejudice, having passed on the burden of tax or duty to another person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case of large claims, it may well result in financial chaos in the administration of the affairs of the State.
- (viii) The decision of this Court in *STO v. Kanhaiya Lal Mukundlal Saraf* [1959 SCR 1350 : AIR 1959 SC 135 : (1958) 9 STC 747] must be held to have been wrongly decided insofar as it lays down or is understood to have laid down propositions contrary to the propositions enunciated in (i) to (vii) above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in *Kanhaiya Lal* [1959 SCR 1350 : AIR 1959 SC 135 : (1958) 9 STC 747] have also been wrongly decided to the above extent. This declaration — or the law laid down in Propositions (i) to (vii) above — shall not however entitle the State to recover the taxes/duties already refunded *and* in respect whereof no proceedings are pending before any authority/Tribunal or Court as on this date. All pending matters



WEB COPY



W.P.No.1011 of 2022

shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an authority, Tribunal or Court *or* otherwise.

- (ix) The amendments made and the provisions inserted by the Central Excises and Customs Law (Amendment) Act, 1991 in the Central Excises and Salt Act and the Customs Act are constitutionally valid and are unexceptionable.
- (x) By virtue of sub-section (3) to Section 11-B of the Central Excises and Salt Act, as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in sub-section (3) of Section 27 of the Customs Act, 1962, as amended by the said Amendment Act, all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactments. No suit for refund of duty is maintainable in that behalf. So far as the jurisdiction of the High Courts under Article 226 of the Constitution — or of this Court under Article 32 — is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power



WEB COPY



W.P.No.1011 of 2022

under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it override it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.

(xi) Section 11-B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that *Union of India v. Jain Spinners* [(1992) 4 SCC 389] and *Union of India v. ITC* [1993 Supp (4) SCC 326] have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated — in the sense that the appeal period has also expired — before the commencement of the 1991 (Amendment) Act (19-9-1991), they cannot be reopened and/or governed by Section 11-B(3) [as amended by the 1991 (Amendment) Act]. This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.

(xii) Section 11-B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It, therefore, cannot be said that Section 11-B is a device



W.P.No.1011 of 2022

to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962.

13. Therefore, the views expressed in the Division Bench of this Court in CMA.No.601 of 2018 in the case of **M/s.3E Infotech, 11 B/1, 2nd Floor, New Street, Parvathipuram, Nagercoil, Kanyakumari – 629 003. vs. 1. Customs, Excise & Service Tax Appellate Tribunal, No.26, Shastri Bhavan, Annex Building, Haddows Road, Chennai – 600 006 and another**, is incorrect. It cannot be applied to the facts of the case.

14. A mandamus can be issued only when there is a corresponding statutory duty on the respondent to consider the petitioner's refund claim beyond the period of limitation. Since, refund claims have to be filed beyond the period of limitation prescribed under the Scheme of the Finance Act, 1994, incorporating Section 11B of the Central Excise Act, 1994, no case is made out for issuance of a mandamus.



WEB COPY



W.P.No.1011 of 2022

C.SARAVANAN,J.

kkd

15. In this petition, refund claim has been filed long after expiry the period of limitation under Section 11-B of the Central Excise Act, 1944 as made applicable to Service Tax under Finance Act, 1994. Therefore, there is no merits in the present writ petition.

16. This writ petition is therefore liable to be dismissed. It is accordingly dismissed. No costs.

23.08.2024

Index: Yes/ No

kkd

To

The Assistant Commissioner of Goods,
and Service Tax and Central Excise,
Pallavaram Division,
Chennai.

W.P.No.1011 of 2022