

(1986) 02 MP CK 0035

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 13 of 1982

Advani Oerlikon Limited

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 07-02-1986

Acts Referred:

Central Excise Rules, 1944 — Rule 11
Central Excises and Salt Act, 1944 — Section 11B
Companies Act, 1956 — Section 37
Constitution of India, 1950 — Article 226, 227
Contract Act, 1872 — Section 72
Limitation Act, 1963 — Article 113

Citation : (1987) 14 ECC 94 : (1987) 13 ECR 448 : (1988) 36 ELT 423

Hon'ble Judges : J.S. Verma, Acting C.J.; B.M. Lal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. By this petition under Articles 226 and 227 of the Constitution of India, the petitioners seek a writ of certiorari for quashing the orders contained in Annexures "D", "F" and "H" dated 5-6-1975, 24-12-1975 and 15-4-1981, passed by respondent No. 2 Assistant Collector, Central Excise, Raipur, Appellate Collector, Central Excise, New Delhi and Joint Secretary and Additional Secretary, Government of India, Ministry of Finance, respectively, and further by issuing a writ of mandamus, the respondents be directed to refund the amount of Rs. 1,03,676.40 p. together with interest at the rate of 18 per cent from the date of collection till payment.

2. In short, the petitioners' case is that petitioner No. 1 Advani-Oerlikon Ltd. is a company registered under the Companies Act and carries on business of manufacturing welding electrodes and the petitioner No. 2 is the Director and shareholder of petitioner No. 1. Welding electrodes are excisable product and an item under Tariff Item No. 50 to the First Schedule of the Central Excises and Salt Act, 1944 (hereinafter referred to as the "Act"). During the period from June

17th, 1971 to 31st March, 1972, the petitioners cleared the goods on payment of duty at the price approved as per their own declaration and assessments were made accordingly. As such, though the petitioners gave discount to their customers at the rate of 10 per cent to 12 per Cent, but the same could not be deducted while furnishing the return (Price list). So also the department could not detect their mistake in not deducting the trade discount offered by the petitioner-company and as such in common mistake of law Committed by both the petitioners and the respondents, the huge amount of Rs. 1,03,676.40 p. was deposited in excess, pertaining to the period from 17-6-1971 to 31 -3-1972.

3. The petitioners after realising their mistake made an application along with a letter dated 19-6-1974 before the respondent No. 2 for refund of the amount which was deposited by them under common mistake of law committed by both the sides. Under repeated Rule 11 of Central Excises and Salt Rules, 1944, framed u/s 37 of the Act, the period of limitation prescribed for refund of amount, was one year. Now, u/s 11B of the Act, the period prescribed for refund is six months from the date of payment of duty.

4. The respondent No. 2, Assistant Collector, rejected the said application for refund. The appeal and revision preferred by the petitioners before the respondent No. 3 Collector Central Excise and respondent No. 2 respectively, were also rejected on 24-12-1975 and 16-4-1981 on the ground, inter alia, that within the prescribed period of limitation, as contemplated under Rule 11 of the said Rules, the application for refund was not made and therefore, the same, being barred by limitation, the petitioners are not entitled to get any refund. However, dismissing the application on the ground of limitation, the taxing authorities have definitely reached the conclusion that due to common mistake of law committed by both the sides, the amount in question was deposited by the petitioners.

5. It is against the rejection of the application for refund that the present petition has been filed.

6. The petitioners' main contention is that if both the sides have committed common mistake of law in depositing and accepting the amount of tax, the same is liable to be refunded for which the period of limitation prescribed under Rule 11 of the said Rules, has no application. On the other hand, the general law of limitation prescribed under the Limitation Act, 1963, would apply and for which three years' period of limitation is there. It is next submitted that the initial application having been made within the prescribed period of limitation of 3 years, the authorities should have ordered for refund of the amount of tax.

7. The learned counsel for the respondents, on the other hand, submitted that the provisions of Rule 11 of the said Rules, were mandatory in terms and the petitioners having not complied with any terms of Rule 11, the question of refund of tax does not arise and the authorities have rightly rejected the application, though finding that due to common mistake of law committed by both the sides,

the petitioners had deposited the amount and the respondents had accepted the same.

8. After hearing the rival contentions of both the parties, we have reached the conclusion that this petition must be allowed.

9. u/s 72 of the Indian Contract Act, had the petitioners filed a suit within the period of limitation for refund of the excess amount of tax, so deposited by them, the same would have been decreed in their favour as the respondents have admitted by common mistake of law the petitioners have deposited the amount of tax and the respondents have accepted the same. But, in the instant case, the petitioners, instead of availing of the remedy provided under the general law, against the order of respondent No. 1, have filed this writ petition.

10. Under Article 113 of the Limitation Act, 1963 which is admittedly applicable to the facts of this case, a suit for recovery of such excess duty/tax paid, has to be filed within three years from the date of payment. The amount was paid during the period from 17-6-1971 to 31-3-1972 and the application for refund was filed on 19-6-1974. Therefore, the amount of tax so paid by the petitioners from 19-6-1971 to 31-3-1972. the application for its refund being within limitation in accordance with the provisions of Article 113 of the Limitation Act, 1963. excluding the amount which the petitioners deposited on 17th and 18th June 1971, i.e., for two days, they are entitled to get it refunded, as the application for refund for rest of the amount is well within time.

11. It is not disputed that the amount in question was paid under bona fide mistake and therefore, in such circumstances, under Article 226 of the Constitution of India, this Court has been vested with the powers for the enforcement of fundamental rights as well as statutory rights to make consequential order, even for repayment of money realised by Government without authority of law and therefore, if the remedy available is exhausted by the petitioners and the only remedy left is by way of seeking relief under Article 226 of the Constitution of India, in such circumstances, that cannot be denied to the petitioners. For seeking relief under writ jurisdiction, although there is no specific limitation prescribed, yet generally, if within three years the wrong is brought to the notice of this Court, invoking provisions of Articles 226 and 227 of the Constitution of India, then certainly, the lis being within the period of general limitation, the petitioner could be heard on merits and an appropriate relief could be granted in his favour. Applying this principle to the facts of the present case, the refund application, barring the refund of tax for two days, as stated above, was within limitation of three years and further, in continuation, after exhausting the statutory remedy under appeal and revision, immediately thereafter, the petitioners by invoking the provisions of Articles 226 and 227 of the Constitution of India, have filed this petition and therefore, in our opinion, the relief as claimed by them for refund of the amount for which even the respondents have admitted that under mistake of law they have accepted the amount, cannot be denied.

12. In A. Madan Mohan Vs. Kalavakunta Chandrasekhara, it has been held that for excess duty paid, relief under Article 226 of the Constitution of India could be granted where initially the application for refund was made within three years. In the instant case also as stated aforesaid, the application for refund was made within three years, barring the claim for two days i.e., 17th and 18th June, 1971, for which period the claim of the petitioners is barred by limitation.

13. From the discussion aforesaid, excepting the claim of refund of tax for two days, i.e., 17th and 18th June, 1971, only the rest of the tax paid thereafter from 19.6.1971 to 31.3.1972 by the petitioners, is ordered to be refunded to them. Annexures "D", "F" and "H" are quashed accordingly.

14. The petition is allowed to the extent indicated above. However, under the circumstances of the case there shall be no order as to costs. The security amount, if any, be refunded to the petitioner.