(2014) 04 BOM CK 0080

In the Bombay High Court

Case No : C.E. Appeal No. 72 of 2013

Andrew Telecom (I) Pvt. Ltd. APPELLANT

Vs

Commissioner of Cus. and C. Ex. RESPONDENT

Date of Decision : 03-04-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11, 11A, 11B, 11B(1), 12A
Constitution of India, 1950 — Article 226, 32
Contract Act, 1872 — Section 72
Customs Act, 1962 — Section 27

Citation : (2014) 45 GST 305 : (2015) 31 GSTR 57 : (2014) 34 STR 562 : (2015) 80 VST 79

Hon'ble Judges : S.C. Dharmadhikari, J;G.S. Kulkarni, J

Bench : Division Bench

Advocate : R.V. Desai, Senior Advocate a/w Anil Khanna, M.S. Bharadwaj, Rohit Pardeshi and N.P. Khutal, Advocate for the Appellant; Pradeep S. Jetly, Advocate for the Respondent

Judgement

1. This Appeal u/s 35G of the Central Excise Act, 1944 is directed against the order passed by the Customs, Central Excise, & Service Tax Appellate Tribunal, Panaji, Goa dated 25-6-2012/16-8-2012 [2012 (28) S.T.R. 588] allowing the Appeal preferred by the Respondent/Revenue. The Revenue was in appeal before the Tribunal as it was aggrieved and dissatisfied with the order of the Commissioner of Customs, Central Excise & Service Tax (Appeals) dated 25-11-2010. The Commissioner of Customs, Central Excise & Service Tax (Appeals) [for short "Commissioner (Appeals)"] allowed the Appeal preferred by the Appellant/Assessee before us. The Commissioner (Appeals) quashed and set aside the order of the Assistant Commissioner rejecting the application of the Appellant/Assessee for refund of Service Tax. The Application was rejected on the ground that it was filed beyond the period of one year from the relevant date.

2. The Revenue, therefore, carried the matter to the Tribunal. The Tribunal has held that the Assistant Commissioner was right in rejecting the application for

refund, by applying the bar contained in sub-section (1) of Section 11B of the Central Excise Act, 1944.

3. Mr. R.V. Desai, learned Senior Counsel appearing in support of this Appeal, submits that the following questions would arise for determination and consideration in this Appeal:

(i) Whether the provisions of Section 11B of the Central Excise Act, 1944 apply to the Export Services?

(ii) Whether in facts and circumstances of the case and in law the Tribunal was justified in rejecting the refund of Service Tax paid, on limitation ground u/s 11B of the Central Excise Act, 1944, which was paid due to misunderstanding of the law?

(iii) Whether the Tribunal was justified in relying on paragraph 99 of the judgment of the Hon''ble Apex Court reported in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others,

(iv) Whether in the facts and circumstances of this case and in law, the Tribunal was justified in not considering the C.B.E. & C. Circular dated 24-2-2009 and the Apex Court judgment in the case of Union of India and others Vs. I.T.C. Limited, and the judgments of the Madras High Court in Collr. Of Cus. Vs. Indo-Swiss Synthetic Gem Mfg. Co. Ltd., and in Natraj and Venkat Associates Vs. Assistant Commissioner, Service Tax, ?

4. Mr. Desai submits that these are substantial questions of law. He submits that the Tribunal''s order has far reaching consequences and in the event the Tribunal''s view is upheld, then, if a duty is recovered or paid contrary to the provisions of the Central Excise Act, 1944 or that a Service Tax was not liable to be recovered or paid in accordance with the provisions of the Central Excise Act, 1944, would ordinarily mean the recovery is illegal, but the Tribunal makes an artificial distinction between constitutionality of the levy and illegality thereof. In any illegal recovery, the Revenue is not entitled to retain the benefit or sums. The application for refund could not have been rejected by applying the bar contained in Section 11B(1) of the Central Excise Act, 1944. Mr. Desai would submit that the Tribunal''s view proceeds on misreading and misinterpretation of the law laid down by the Nine Judge (Larger Bench) decision of the Hon''ble Supreme Court in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, . Mr. Desai submits that the Hon''ble Supreme Court and in the majority view, does not make any distinction as between a levy which is unconstitutional and illegal. Mr. Desai submits that even an unconstitutional levy is illegal. If a levy is contrary to the Act or the Act does not contemplate recovery of any duty or imposition of any liability, then, such case is also covered by the proposition culled out in the judgment of the Hon''ble Supreme Court in the case of Mafatlal Industries (supra). To such case as well, there cannot be applicability of the bar. The Tribunal has, therefore, erred in rejecting the claim for refund made by the Appellant/Assessee by holding that it is time barred. Such view of

the Tribunal goes contrary to the provisions of the Central Excise Act, 1944 and the law laid down by the Hon''ble Supreme Court in the case of Mafatlal Industries (supra).

5. Mr. Desai was at pains to point out that the view taken by the Hon''ble Supreme Court that in certain cases a suit would not lie, but a writ petition under Article 226 or Article 32 of the Constitution of India would be maintainable to claim refund of the tax levied and collected illegally and to such proceedings the bar u/s 11B(1) of the Central Excise Act, 1944 cannot be applied. This has been extended to several cases of refund under the Central Excise Act, 1944. In other words, even if this Court was to exercise jurisdiction u/s 35G of the Central Exercise Act, 1944 and decide an appeal from the order of the Tribunal, still its plenary powers can be invoked by the Assessee. The application of such plenary powers and inherent jurisdiction vested in it enables this Court to hold that the application for refund of duty recovered illegally is otherwise maintainable. This is how reliance is placed by Mr. Desai on the judgments delivered by the Karnataka and Madras High Courts. Mr. Desai, therefore, submits that looked at from any angle this Court''s power cannot be circumscribed or restricted by Section 11B of the Central Excise Act, 1944. All that the Hon''ble Supreme Court holds is that while considering such an application for refund, the Court must be conscious of the principle of unjust enrichment. That principle is now statutorily recognized and must be held to be part of the Rule of Law. Just as there cannot be double taxation, there ought not be double benefit. When the burden is passed on the consumer, then, the application should not be considered and granted. Beyond that, the Tribunal''s view cannot be upheld.

6. On the other hand, Mr. Jetly, learned counsel appearing for the Respondent/ Revenue, submits that the Appeal does not raise any substantial question of law. The application for refund has been made under the Central Excise Act, 1944. That is to claim refund of the Service Tax which has been paid by the Appellant/ Assessee. In considering that application, the Assistant Commissioner and the Tribunal could not have ignored much less overridden the provisions of the Central Excise Act, 1944. Such application has to be considered in the light of the provisions enabling grant of refund or else there is nothing in the Act which would enable the Assessee to claim refund. If refund is claimed in accordance with the Central Excise Act, 1944, then, all provisions by which such refund applications can be considered and granted are automatically applicable. If such applications or requests cannot be granted unless they are made within the specified period, then, the view taken by the Assistant Commissioner is in accordance with law. The Commissioner (Appeals) has overlooked and brushed aside the statutory provisions, therefore, the application for refund could not have been granted by him in this manner. His view has been rightly set aside and the patent error has been corrected by the Tribunal. Such view of the Tribunal and in the given facts and circumstances of the case, does not raise any substantial question of law. The Appeal, therefore, deserves to be dismissed.

7. With the assistance of Mr. Desai and Mr. Jetly, we have perused the memo of Appeal and all relevant annexures thereto. We have also perused the statutory provisions, namely, Section 11B of the Central Excise Act, 1944. We have also perused the judgments which have been brought to our notice.

8. Before noting the facts and circumstances in this case, a reference can usefully be made to Section 11B of the Central Excise Act, 1944. It is conceded that the application was made for refund of the Service Tax. The levy, assessment and collection of Service Tax and to the extent permissible by law is with the aid of the Central Excise Act, 1944. By certain provisions of the Finance Act, the Central Excise Act, 1944 has been made applicable in relation to the refund of amount of Service Tax paid by the Assessees. Section 11B of the Central Excise Act, 1944 reads as under:

11B. Claim for refund of duty and interest, if any, paid on such duty:

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

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 (40 of 1991), such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act:

Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant''s current account maintained with the Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court 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).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its reassembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.

Explanation.--For the purposes of this section, -

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(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;

(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 a certain period, on the basis of the 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 5A, 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.

9. A perusal thereof would indicate that any person claiming refund of any duty of excise and interest, if any, paid on such duty, may make an application for refund of such duty and interest, if any paid on such duty, to the Authorities specified before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including certain documents referred to in Section 12A 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. Thus, the application for refund has to be made before expiry of one year from the relevant date. In the facts and circumstances before us, the case is covered by Explanation (B)(f) meaning thereby, the application for refund should have been made in the present case within one year from the date of payment of duty.

10. Now the circumstances in which such claim was made need to be noted. The Appellants before us made the application (Annexure F to the Appeal memo) dated 28-4-2010 submitting that they have an Agency Commission Agreement with M/s. Andrew AG, Switzerland. In terms of the said agreement, the Appellants were required to find Indian customers for overseas principal products in India and in return, they were paid the amounts or sums in convertible foreign exchange which they realized through normal banking channel. This agency commission service activity falling under the Business Auxiliary Services, in their case, amounts to export of services in terms of the Export of Services Rules, 2005. The Appellants paid the Service Tax on the value of foreign agency commission which they realized. In the light of the same and in view of the circular of February, 1999 issued by the Central Board of Excise and Customs, the Appellants claimed that they are entitled for refund of the Service Tax which they have paid on agency commission service activity erroneously. The paragraph 5 of this application states that Appellants were under bona fide mistake that the subject service activity would not be amounting to export of services till the Circular of the Central Board of Excise and Customs came to be issued. Therefore, they did not file the refund claim in respect of the subject Service Tax. Hence, they requested to condone the delay in filing the rebate claim. It is such an application which was placed before the Assistant Commissioner and he passed the order on 28-6-2010 holding that the application is clearly traceable to sub-section (1) of Section 11B of the Central Excise Act, 1944. In considering such application, the period prescribed in the statutory provision cannot be ignored. He, therefore, held that once the Service Tax has been paid for the period May, 2004 to October, 2007, but the application for refund has been made on 28-4-2010, then, such an application is clearly barred in terms of Section 11B(1) of the Central Excise Act, 1944. He, therefore, dismissed the application accordingly.

11. The Appeal to the Commissioner (Appeals) came to be allowed on 25-11-2010 and in allowing the same, the Commissioner (Appeals) held as under:--

I have examined the impugned order and submissions. In view of the C.B.E. & C. Circular No. 111/05/2009-S.T. dated 24-2-2009 issued from F. No. 13/307/2007-CX. 4 (Pt.) the fact remains that the appellant''s activity of marketing services for overseas principal was amounting to export of services and that therefore the appellant was not required to pay any Service Tax on the said activity.

The Hon''ble Madras High Court in the case of Collr. Of Cus. Vs. Indo-Swiss Synthetic Gem Mfg. Co. Ltd., that the Hon''ble Madras High Court was pleased to hold that time bar u/s 11B of the Central Excise Act, 1944/Section 27 of the Customs Act, 1962 is not applicable in respect of any amount collected by the Government which should have been paid by the assessees. The Hon''ble Court was pleased to observe that the provisions of Section 11B are applicable only to amount which can be called as duty and not to any amount which cannot be called as duty.

The Hon''ble Supreme Court in the case of Union of India v. LTC Limited reported in 1993 (67) E.L.T. 2 (S.C.) in which the Hon''ble Apex Court upheld the view that the duty of excise is that which is levied in accordance with law and that any money which is realized in excess of what is permissible in law would be a realization made outside the provision of the Act.

Hon''ble Madras High Court in the case of Natraj and Venkat Associates Vs. Assistant Commissioner, Service Tax, quoted by the appellant herein. In the said case the Hon''ble High Court was pleased to hold that the central excise duty which should not have been paid but paid can be recovered by filing a refund claim even beyond the time period specified u/s 11B of the Central Excise Act, 1944.

In view of the above, the impugned order is not correct in law and is, therefore, set aside. Lower Authority directed to grant refund.

Appeal allowed.

12. The Revenue, therefore, approached the Tribunal and the Tribunal in upholding the order of the Assistant Commissioner came to a conclusion that the Challans which have been filed along with the refund application show that the Service Tax payments were made during the period 2006-2007 and 2007-2008 and last such challan was dated 1-12-2007. The Tribunal also noticed that the Service Tax liability for the period May, 2004 to March, 2006 was discharged in May, 2006. If the refund claim was submitted in the office of the Assistant Commissioner on 28-4-2010, then, it was clearly beyond the period of one year prescribed u/s 11B(1) of the Central Excise Act, 1944.

13. We are not in agreement with Mr. Desai that the Tribunal in upholding the order of the Assistant Commissioner has misread and misinterpreted the law laid down by the Hon''ble Supreme Court in the case of Mafatlal Industries (supra). We are of the view that the Tribunal in order to support its reasoning''s and conclusions referred to the judgment in the case of Mafatlal Industries (supra).

That reference was made in the context of dealing with the argument that the application for refund of duty paid and recovered illegally, cannot be rejected by invoking the bar of limitation or by applying any technical standards. The Tribunal referred to the judgment of the Larger Bench only to reinforce its conclusion that even if the refund is claimed by filing a Writ Petition under Article 226 or invoking Article 32 of the Constitution of India, such petitions and proceedings have to be decided in accordance with the Rule of Law. They cannot be decided by ignoring or overriding the law. The regime of law has to be followed and not abrogated is the conclusion which the Hon''ble Supreme Court reaches and which the Tribunal follows. Therefore, the Hon''ble Supreme Court cautions the High Courts that while deciding the claims for refund and which are subject matter of Writ Petitions under Article 226 of the Constitution of India, the provisions like Section 11B(1) of the Central Excise Act, 1944 have to be adhered to or due regard must be given to the same. Beyond that, we do not see how the Tribunal committed an error or has rather misread or misapplied the judgment. We need not go into any wider question or larger controversy.

14. Mr. Desai would submit that an unconstitutional levy is also illegal. If the levy is unconstitutional meaning thereby it is null and void ab initio, then, the judgment in Mafatlal Industries (supra) would permit consideration of an application for refund filed belatedly. Mr. Desai submits that all that the judgment of the Nine Judge Bench holds is that unconstitutional and illegal levies cannot be upheld. In his submission, the predominant consideration while giving relief to the petitioners and applicants who seek refund of the amounts paid pursuant to such levies is that they should not be unjustly enriched. We are of the opinion that the Hon''ble Supreme Court may be considering the issue of validity of the provisions like Section 11B(1) introduced in the Central Excise Act, 1944, but the judgment cannot be applied to such an extent as would enable us to totally override and brush aside a provision like Section 11B with the rule of limitation carved out therein. The distinction as pointed out by Mr. Desai from the judgment in the case of Mafatlal Industries (supra) between unconstitutional and illegal levy or in his submission both being treated as par, will not enable us to hold that in the facts and circumstances of the present case the Assistant Commissioner and the Tribunal committed any grave error of law or perversity in rejecting the refund claim. The wider question or controversy need not be gone into in the facts of the present case. Suffice it to hold that once the application for refund was made in terms of the Central Excise Act, 1944, it has to be considered in accordance therewith and not otherwise. If the provision of the Central Excise Act, 1944 has been invoked, then, the same must apply with full force. One cannot agree with the Assessee that the provision may have been invoked, but the claim for refund should be considered by not applying the Rule of Limitation prescribed therein. As has been held by the Hon''ble Supreme court in numerous cases and decisions that the Rule of Limitation is provided in order to uphold a larger public interest. The statutes and Rules of limitation are statutes and prescriptions of repose and peace. They give finality to certain

proceedings and orders. The reopening thereof is not permissible beyond a particular limit. In these circumstances we do not see how the Tribunal erred in applying the Rule of Limitation and reversing the order passed by the Commissioner (Appeals). The order of the Assistant Commissioner and that of the Tribunal in the given facts and circumstances cannot be said to be perverse. Both have rejected the claim as in their opinion it was stale and time barred. We do not see how such view can raise a substantial question of law. The view taken is imminently possible. We are, therefore, of the view that the Appeal fails and it is, accordingly, dismissed.

15. The judgment, on which Mr. Desai placed reliance, namely, in the case of Union of India and others Vs. I.T.C. Limited, , has been duly noted and considered together with other judgments in the case of Mafatlal industries (supra). Once we have not gone into any wider question or larger controversy and beyond what was necessary for decision of this Appeal, then, any reference to these judgments becomes unnecessary.

16. What remains then is the judgment of a Division Bench of the Karnataka High Court in the case of 966947--> . There, the Division Bench was considering a Writ Appeal. That Writ Appeal was directed against the order of the learned Single Judge in Writ Petition. The Revenue was in Writ Appeal because it was aggrieved by the order of the learned Single Judge. The facts in the said case were that the Service Tax came to be paid in accordance with the Finance Act, 1994 for the services rendered for the Trust by constructing some buildings in May, 2005 to February, 2006 and May, 2006 to February, 2007. Two refund applications filed in the month of March, 2008 and to be precise on 19-3-2008 and which were received by the Department on 28-3-2008 were rejected not on the ground that has been pressed into service by the Revenue before us, but on the ground that the amount paid by the Assessee was not a Service Tax, but it was in the nature of deposit with the Revenue. The amounts collected erroneously need not be refunded to the concerned persons. The Applications for refund were rejected on the ground that they were filed beyond the period of limitation prescribed u/s 11B of the Central Excise Act, 1944. This rejection of claims inter alia on the ground of limitation was questioned by filing an Appeal before the Commissioner (Appeals) and he upheld the original order. The Writ Petition was directed against both the orders and the learned Single Judge set aside the order of the Commissioner (Appeals) and directed refund of Service Tax paid. The learned Single Judge held that Section 11B was not applicable since the amount paid by the Petitioner in that case was not duty. It was held to be a deposit with the Department and not a duty paid. The learned Single Judge held that there was no necessity to invoke Section 11B of the Central Excise Act, 1944. After recording such findings, the learned Single Judge reached a conclusion that the disinclination to entertain the claim for refund is improper and illegal, therefore, proceeded to quash the orders in that behalf. It is in this context that the Division Bench of the Karnataka High Court speaking through Her Ladyship Hon''ble Mrs. Justice Manjula Chellur as Her Ladyship then was,

held thus:

15. We are not concerned with the other conditions of Section 11B of the Act because it is not the case of the appellant Department that the burden of Service Tax was passed on to any other person. As a matter of fact, the controversy in this appeal revolves around the maintainability of the very application filed u/s 11B of the Central Excise Act and whether Sec. 11 applies to the facts of the present case at all. In the case of Mafatlal Industries Ltd. v. Union of India (supra), the question was with regard to the refund of Central Excise and Customs Duties. It was held that all claims except where levy is held to be unconstitutional, is to be preferred and adjudicated upon u/s 11B of the Central Excise Act, 1944 or u/s 27 of the Customs Act, 1962 and subject to claimant establishing that burden of duty has not been passed on to a third party. In such circumstances, it was held, no civil suit for refund of duty is maintainable. It also observes that writ jurisdiction of High Courts under Article 226 and of Supreme Court under Article 32 remains unaffected by the provisions of Section 11B of the Act. It was further held that concerned Court while exercising the jurisdiction under the said articles, will have due regard to the legislative intent manifested by the provisions of the Act and the writ petition would naturally be considered and disposed of in the light of the provisions of Section 11B of the Act. It has been held therein that power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it, as the power under Article 226 is conceived to serve the ends of law and not to transgress them. At paragraph 113 of the said judgment, they classify the various refund claims into three groups or categories:

(a) The levy is unconstitutional outside the provisions of the (I) Act or not contemplated by the Act.

(b) The levy is based on misconstruction or wrong or erroneous (II) Interpretation of the relevant provisions of the Act, Rules or Notifications : or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the fundamental principles of judicial procedure.

(c) Mistake of law the levy or imposition was (III) unconstitutional or illegal or not exigible in law (without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee either by the High Court or the Supreme Court, and as soon as the assessee came to know of the judgment (within the period of limitation), he initiated action for refund of the tax paid by him, due to mistake of law.

After referring several judgments and provisions of Sections 11A & 11B of Central Excise Act, at paragraph 137 of the said judgment, their Lordships have concluded as under:

137. Applying the law laid down in the decisions aforesaid, it is not possible to conclude that any and every claim for refund of illegal/unauthorized levy of tax can be made only in accordance with the provisions of the Act (Rule 11, Section

11B, etc. as the case may be), and an action by way of suit or writ petition under Article 226 will not be maintainable under any circumstances. An action by way of suit or a petition under Article 226 of the Constitution is maintainable to assail the levy or order which is illegal, void or unauthorized or without jurisdiction and/or claim refund, in cases covered by propositions No. (1), (3), (4) and (5) in Dulalbhai''s case, as explained hereinabove, as one passed outside the Act and ultra vires. Such action will be governed by the general law and the procedure and period of limitation provided by the specific statute will have no application Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar, ; Escorts Ltd. v. Union of India [1994 Supp (3) SCC 86] Rule 11 before and after amendment or Section 11B cannot affect Section 72 of the Contract Act or the provisions of Limitation Act in such situations. My answer to the claims for refund broadly falling under the three groups of categories enumerated in paragraph 6 of this judgment is as follows:

Where the levy is unconstitutional outside the category (I) provisions of the Act or not contemplated by the Act

In such cases, the jurisdiction of the civil courts is not barred. The aggrieved party can invoke Section 72 of the Contract Act, file a suit or a petition under Article 226 of the Constitution and pray for appropriate relief inclusive of refund within the period of limitation provided by the appropriate law. Dulabhai''s case (supra) para 32 clauses (3) and (4).

20. In the case of Hind Agro Industries Limited Vs. Commissioner of Customs and Others, , it was the case where cess amount was paid under protest by the appellants. In that case after referring to Mafatlal Industries case (supra), the lordships of Delhi High Court have held that in Mafatlal Industries Ltd.''s case (supra), Hon''ble Supreme Court was dealing with the case of refund of duty payable within the meaning of either the Central Excises and Salt Act, 1944 or the Customs Act, 1962 as the case may be, wherein they have held that all claims for refund ought to be filed only in accordance with the Customs Act. Therefore, it did not include the payment made under some other enactment, which for some reason had erroneously been made to the Customs authorities. Even otherwise by referring to paragraph 137 of Mafatlal Industries case, one has to see whether the amount claimed is unconstitutional and outside the provisions of Section 11B of the Act.

21. In the case of Nataraj and Venkat Associates (supra), this was pertaining to Service Tax wherein petitioner company was dealing in architectural services and paid Service Tax for the construction of the building carried on at Sri Lanka and contended it would not have attracted levy of Service Tax. In other words, there was an application for refund of said tax and the question that arose therein was what is the relevant date for the commencement of the period of limitation for the purpose of Section 11B and was held that it would be the date of payment of duty. It was held in the said case that amounts paid cannot be taken to be duty of excise, therefore bar of limitation u/s 11B cannot be applied because such

limitation would come in the way of any person claiming refund of any duty of excise and interest.

22. In the case of Commissioner of Central Excise, Bangalore v. Motorola India (P.) Ltd. (supra) the Division Bench of this Court considered similar issue. It was a case where excess amount was paid over duty under Central Excise Act on the direction of the Department. There was an application for refund of amount and the same came to be rejected by the Assistant Commissioner on the ground of lapse of time. It was confirmed by both the Appellate Authority and also the Tribunal. Aggrieved by the order of the Tribunal, Revenue came up before the High Court. Their lordships of the Division Bench held that order of the Tribunal to allow the claim on the basis that amount paid by mistake cannot be termed as duty in the said case was justified and therefore applying the law laid down in the decision of Apex Court in the case of India Cements Ltd. Vs. Collector of Central Excise, , dismissed the appeal.

23. Now we are faced with a similar situation where the claim of the respondent/ assessee is on the ground that they have paid the amount by mistake and therefore they are entitled for the refund of the said amount. If we consider this payment as Service Tax and duly payable, automatically. Section 11B would be applicable. When once there was no compulsion or duty cast to pay this Service Tax, the amount of Rs. 1,23,96,948/- paid by petitioner under mistaken notion, would not be a duty or "Service Tax" payable in law. Therefore, once it is not payable in law there was no authority for the department to retain such amount. By any stretch of imagination, it will not amount to duty of excise to attract Section 11B. Therefore, it is outside the purview of Section 11B of the Act.

17. These are paragraphs on which Mr. Desai placed heavy reliance. Far from assisting the Assessee before us, they militate against the submissions of Mr. Desai. The last paragraph or some sentences therein cannot be read in isolation. We must, therefore, see all these observations in the context of the facts emerging from the record before the Division Bench. The facts and circumstances peculiar to the case before the Division Bench cannot be ignored, but have" to be taken into consideration. The observations, therefore, must be seen in that context and not de hors the same. We are, therefore, of the view that the Division Bench in upholding the learned Single Judge''s observations relied upon the principle that when the amount is deposited with the Department and it does not constitute any demand or payment in accordance with law, then, same deserves to be refunded and while granting and awarding such claim a technical plea of limitation cannot be raised. If the matter was outside the purview of Section 11B, then, the rule of limitation prescribed therein could not have been applied. This judgment is, therefore, clearly distinguishable on facts. Equally, the judgment noted by the Division Bench of Karnataka High Court in paragraph 21 must be seen in the context. If the amount paid cannot be taken to be duty of excise, then, the bar of limitation cannot be applied. Even otherwise and with greatest respect, the observations and findings rendered earlier cannot be

reconciled with the last few lines of this judgment. Even a writ petition under Article 226 of the Constitution of India cannot be decided by overriding a law or legal regime. There is no warrant or justification for holding that a stale or belated claim can be granted in a Constitutional remedy by ignoring a statutory prescription.

18. Before us, the undisputed position is that the amount was paid by the Appellant as Service Tax. That tax was not imposable or leviable on export of services was a clarification made by the Department and relying on that clarification, the refund of duty or Service Tax was claimed. This was squarely a case falling within the provisions of the Central Excise Act, 1944 and therefore, the rule of limitation u/s 11B was applied. That was applied when the application for refund was made invoking Section 11B of the Central Excise Act, 1944. We have no manner of doubt that when this was the provision invoked, same applies with full force including the rule of limitation prescribed therein. For these reasons, we are of the opinion that the decisions relied upon cannot be of any assistance. As a result of the above discussion and finding that the Appeal does not raise any substantial question of law, we proceed to dismiss it. It is, accordingly, dismissed. No costs.

