(2010) 11 KAR CK 0159

In the Karnataka High Court

Case No : Writ Appeal Nos. 2992-2993 of 2009 (T-TAR)

Commr. of C. Ex. (Appeals), Bangalore APPELLANT

Vs

Kvr Construction RESPONDENT

Date of Decision : 18-11-2010

Acts Referred:

Citation : (2010) 11 KAR CK 0159

Hon'ble Judges : Aravind Kumar, J.;Manjula Chellur, J.

Bench : Division Bench

Final Decision : Dismissed

Judgement

Manjula Chellur, J.—The Revenue is before us challenging the order of the learned Single Judge passed in K.V.R. Constructions Vs. Commissioner of Central Excise, . Parties are referred to in this appeal as per their rank in Writ Petition. The petitioner, M/s. KVR Construction is a construction company rendering services under category of "Construction of Residential Complex Service" and are paying the Service Tax in accordance with Finance Act, 1994. They have undertaken the construction of following works on behalf of Shri Adichunchanagiri Shikshana Seva Trust by virtue of an agreement dated 7-12-2004 :

(a) Medical college

(b) AIMS Hospital

(c) SJBIT Engineering college

(d) SJBIT Engineering Boys Hostel

2. It is also not in dispute that Service tax came to be paid in accordance with the Finance Act, 1994 for the services rendered for the above trust by constructing above buildings for the periods May 2005 to February 2006 and May 2006 to February 2007. During the month of March 2008, petitioner filed two refund applications dated 19-3-2008 which were received by the Department on

28-3-2008 contending that building construction which was done by them was to a non-profit organization and they were not liable to pay such tax in the light of the Circular No. 80/10/2004 dated 17-9-2004 and sought for refund of Service Tax paid. The Assistant Commissioner of Central Excise by order dated 19-11-2008 came to a conclusion that amount paid by them is not service tax, but it was in the nature of deposit with the Department. He also held that amounts collected erroneously have to be returned to the concerned person. But, however, rejected the refund claim on the ground that applications were filed beyond the period of limitation prescribed under Section 11B of Central Excise Act, 1944 (for short referred to as "Act").

3. Being aggrieved by said order, petitioner preferred an appeal before the Commissioner (Appeals) in Appeal No. 27/2009 who upheld the order of the original authority and dismissed the appeal by order dated 30-3-09. Aggrieved by the rejection of the appeal, the petitioner filed a Writ Petition No. 16773/2009 before the learned Single Judge seeking setting aside the order of the Commissioner (Appeals) and for refund of Service Tax paid.

4. The learned Single Judge by referring to Section 11B of Central Excise Act, 1944 held that Section 11B is inapplicable since amount paid by petitioner was not a duty paid or deposited and it was held to be deposit with the department and not duty. It was also held there was no necessity for the petitioner to invoke Section 11B of the Act. According to Learned Single Judge, the orders of the Assistant Commissioner and Appellate Tribunal declining to entertain the claim of the respondent was erroneous as it amounted to denial of claim and the order of Commissioner (Appeals) relating to denial of claim is concerned, was held unsustainable and consequently quashed it. The Department was also directed to refund the amounts claimed forthwith in any event not beyond two weeks from the date of the order. Aggrieved by the said order, the Department is before us questioning the order of the Learned Single Judge.

5. According to the appellants, the Learned Single Judge totally misconstrued the ratio on all aspects of refund matters by not considering the case of Mafatlal Industries ltd. v. Union of India reported in 1997 (89) E.L.T. 247 (S.C.), which lays down the parameters of entertaining an application under Section 11B of the Central Excise Act, 1944.

6. According to the learned counsel for the Department, once the amounts are paid as service tax by virtue of Section 83 of Finance Act 1994, the application of Central Excise Act comes into play. Therefore, any amount that has to be refunded has to be in accordance with Section 11B of Central Excise Act, irrespective of the nature of the tax paid, and the refund has to be only under Section 11B of the Act. Hence, he contends that unless, the refund claim is made within the time prescribed under Section 11B of the Act, the respondent could not have had the benefit of refund of the amount and as a matter of fact Form-R prescribed for refund of amounts under Section 11B of the Act was filed by the respondent in the instant case and as such he contends that learned Single

Judge erred in holding Section 11B as inapplicable. Therefore, he prays for the order of the learned Single Judge to be set aside by upholding the order of the Appellate authority.

7. He also contends that by virtue of Section 35B(1)(b) of the Act, there is statutory appeal to the Appellate Tribunal. Therefore, the Writ Petition itself was not maintainable and for this proposition, he relies upon the judgment of Hon''ble Supreme Court in the case of United Bank of India Vs. Satyawati Tondon and Others, .

8. As against this, the learned Senior Counsel for Petitioner-assessee contends that as long as the amount paid by the respondent was an amount leviable and collected in accordance with the procedure, then Section 11B of the Central Excise Act would apply and if once the amount paid by the respondent is outside the purview of Section 11B of the Act, none of the provisions of Section 11B of the Act including time limit would apply and therefore amounts in question were paid under mistake and as such it cannot be construed as duty paid. In view of the same, he contends, Section 11B of the Act is not at all attracted to the facts of the present case.

9. According to the learned Senior Counsel for the petitioner, unless the authority to levy and collect tax in question lies with the department, the amounts paid by the petitioner could not be termed as claim for refund of duty as contemplated under Section 11B of the Act. To substantiate his contention, he relies upon the judgment of the Delhi High Court in the case of Hind Agro Industries Limited Vs. Commissioner of Customs and Others, , judgment of Madras High Court in Writ Petition No. 15357/2009 in the case of Natraj and Venkat Associates Vs. Assistant Commissioner, Service Tax, : Natraj and Venkat Associates Vs. Assistant Commissioner, Service Tax, and judgment of a Coordinate Bench of this Court in the case of Commissioner of C. Ex. Vs. Motorola India Pvt. Ltd., .

10. We have gone through the order of two authorities of the Department and also of the learned Single Judge. We have also gone through the citations relied upon by both sides and have given our anxious consideration to the submissions made at the Bar.

11. It is an undisputed fact that total amount of Rs. 1,24,38,991/- was paid as service tax under different TR-6 challans between February 2005 and February 2007. It is not in dispute the clarifications issued in the circular dated 17-9-2004 includes the building constructions which are for the use of organizations or institutions being established solely for the educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purpose of profit, are not taxable being non-commercial in nature. It is also not in dispute that claim of the respondent before the concerned authority seeking refund of the above said amount was based on the above circular dated 17-9-2004 on the ground that the services are rendered for a non-profit organization. The department is also not denying that services rendered by the respondent by putting up constructions of

several buildings stated above to the trust, which is a non-profit organization, hence, a non-profit service is not taxable.

12. According to the petitioner, above said amounts were paid under a mistaken impression that they were liable to pay such service tax and the amount of refund claimed by them was not charged by them and collected from the person to whom they rendered service. In other words, according to them, they have paid above said amounts under a mistaken notion that they were liable to pay even though they are not liable to pay by virtue of circular dated 17-9-2004 and accordingly sought for refund of the said amount.

13. While adjudicating the refund claim of petitioner, the adjudicating authority accepted the contention of petitioner and held the services rendered by petitioner were not exigible to service tax. As a matter of fact, the order of the Assistant Commissioner of Central Excise dated 19-11-2008 reads as follows :

Thus it is evident that if the building or the civil structure are for the use of organizations or institutions being established solely for the educational religious, charitable, health, sanitation or philanthropic purposes and not for the purpose of profit are not taxable, being non-commercial in nature. Since this clarification issued by the Board vide Circular No. 30/10/2004 dated 17-9-2004 is very clear on the issue, the construction services undertaken by M/s. KVR Construction is not taxable in nature and the assessee is not liable to pay any service tax and he has paid it under the misunderstanding of law. Since the amount collected by the Government is not at all payable by the assessee, this amount would resemble the amount collected without any authority of law. Hence, the amount paid by them is not service tax but in the nature of deposit with the Government. (Emphasis supplied by us)

The order of the Assistant Commissioner clearly indicates that amount lying with the Department is not a service tax but it is in the nature of a deposit with the Government. It also states that amount collected by the Government was not payable by the assessee, therefore, this amount would resemble the amount collected without any authority of law. In other words, the original adjudicating authority opines that amounts paid under mistaken notion as "service tax" was not infact "service tax" but was only in the nature of deposit with the Government and Government had no authority to collect the said amount. So far as the actual act of repayment, he opines that Section 11B of the Act applies and therefore concludes that condition of filing application within one year from the relevant date is not complied with as per Section 11B and hence petitioner is not entitled for the refund of the amount.

14. 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 under Section 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 under Section 11B of the Central Excise Act, 1944 or under Section 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 Section 11A and 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) M/s. Doaba Cooperative Sugar Mills Ltd.., Jalandhar 1988 (37) E.L.T. 487 (S.C.) : 1988 Supp. SCC 683 ; Escorts Limited Vs. Union of India (UOI) and Others, 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)."

15. Yet another ground raised by Revenue is regarding maintainability of Writ Petition on the ground that alternate remedy of appeal under Section 35B(1)(b) of C.E. Act, is available and without availing the same, writ jurisdiction cannot be invoked and relies upon the decision of Satyawati Tondon. The judgment relied upon by the learned Counsel for the appellants in the case of United Bank of India v. Satyawati Tondon (supra) was pertaining to maintainability of writ petition under Article 226 of the Constitution. We have no hesitation to agree with the prepositions laid down in the above cited judgment that whenever an alternate and efficacious remedy is available to the party invoking Article 226 of the Constitution, he cannot take recourse to Article 226. Relevant paragraphs of the said judgment read as follows :

"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers

conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this court, which every High court is bound to keep in view while exercising power under Article 226 of the constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of the compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision etc., and the particular legislation contains a detailed mechanism for redressal of his grievance."

16. If this Court ultimately concludes that Section 11B of the Act is applicable to the facts of the present case, then, the argument of the learned Counsel for the appellant that Writ Petition was not maintainable would merit consideration. Therefore, at this stage, we will not consider the matter regarding maintainability of the Writ Petition, as first we have to look to the provisions of 11B of the Act and then decide whether Section 11B is applicable to the facts of the case as finding thereon would have bearing for considering the issue of maintainability of Writ Petition. Section 11B of the Central Excise Act reads as under :

"11B. Claims for refund of duly : (1) Any person claiming refund of any duty of excise may make an application for refund of 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 document 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." 17. From the reading of the above Section, it refers to claim for refund of duty of excise only, it does not refer to any other amounts collected without authority of law. In the case on hand, admittedly, the amount sought for as refund was the amount paid under mistaken notion which even according to the department was not liable to be paid.

18. According to the appellant, the very fact that said amounts are paid as service tax under Finance Act, 1994 and also filing of an application in Form-R of the Central Excise Act would indicate that the applicant was intending to claim refund of the duty with reference to Section 11B, therefore, now it is not open to him to go back and say that it was not refund of duty. No doubt in the present case, Form-R was used by the applicant to claim refund. It is the very case of the

petitioner that they were exempted from payment of such service tax by virtue of circular dated 17-9-2004 and this is not denied by the Department and it is not even denying the nature of construction/services rendered by the petitioner was exempted from to payment of Service Tax. What one has to see is whether the amount paid by petitioner under mistaken notion was payable by the petitioner. Though under Finance Act, 1994 such service tax was payable by virtue of notification, they were not liable to pay, as there was exemption to pay such tax because of the nature of the institution for which they have made construction and rendered services. In other words, if the respondent had not paid those amounts, the authority could not have demanded the petitioner to make such payment. In other words, authority lacked authority to levy and collect such service tax. Incase, the department were to demand such payments, petitioner could have challenged it as unconstitutional and without authority of law. If we look at the converse, we find mere payment of amount, would not authorize the department to regularise such payment. When once the department had no authority to demand service tax from the respondent because of its circular dated 17-9-2004, the payment made by the respondent company would not partake the character of "service tax" liable to be paid by them. Therefore, mere payment made by the respondent will neither validate the nature of payment nor the nature of transaction. In other words, mere payment of amount would not make it a "service tax" payable by them. When once there is lack of authority to demand "service tax" from the respondent company, the department lacks authority to levy and collect such amount. Therefore, it would go beyond their purview to collect such amount. When once there is lack of authority to collect such service tax by the appellant, it would not give them the authority to retain the amount paid by the petitioner, which was initially not payable by them. Therefore, mere nomenclature will not be an embargo on the right of the petitioner to demand refund of payment made by them under mistaken notion.

19. In the case of Hind Agro Industries Ltd. v. Commissioner of Customs reported in 2008 (221) E.L.T. 336 (Del.), 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 case, 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.

20. 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 paid case that amounts paid cannot be taken to be duty of excise, therefore bar of limitation under Section 11B cannot be applied because such limitation would come in the way of any person claiming refund of any duty of excise and interest.

21. In the case of Commissioner of Central Excise, Bangalore v. Motorola India Pvt. 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. v. Collector of Central Excise -1989 (41) E.L.T. 358, dismissed the appeal.

22. 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 duty 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.

23. The learned Counsel for the appellant has also contended that when the order of refund was rejected, the respondent could have approached this Court instead of filing the appeal choosing a wrong forum, could not be a deficit coming in the way to claim refund.

24. However, the petitioner has not approached the Tribunal after the order passed by 1st appellate authority and they have approached this Court. Therefore, even the provisions of Section 35B(1)(b) would not be applicable. From the facts of the case as discussed herein above, it emerges that petitioner has approached this Court contending that Section 11B is not applicable as there was no duty cast on them to pay "service tax" and they have paid such amount under mistaken notion. Viewed from nay angle, we are of the opinion that the learned Single Judge was justified in setting aside that portion of the order which

rejected the claim of refund and accordingly same is confirmed. Accordingly, the appeals are dismissed. The concerned appellant authority is directed to refund the amounts as directed by the learned single judge within an outer limit of six weeks from the date of receipt of copy of this order.