

(2014) 07 AHC CK 0310

In the Allahabad High Court

Case No : Central Excise Appeal No. 116 of 2014

Commr. of Cus., C. Ex. and S.T.

APPELLANT

Vs

Indian Farmers Fertilizers Coop. Ltd.

RESPONDENT

Date of Decision : 02-07-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B
Finance Act, 1994 — Section 65(105)(zzz)

Citation : (2014) 47 GST 4 : (2014) 35 STR 492

Hon'ble Judges : Dhananjaya Yashwant Chandrachud, C.J; Dilip Gupta, J

Bench : Division Bench

Advocate : B.K. Singh Raghuvanshi, Advocate for the Appellant; Bharat Ji Agrawal, Sr. Counsel, Shubham Agrawal and A.S. Dass, Advocate for the Respondent

Judgement

1. This appeal by the revenue arises from the decision of the CESTAT dated 9 December, 2013 2014 (201) ECR 1 40 on an appeal by the assessee. The appeal of the assessee having been allowed, the refund claim of the assessee in respect of certain tax amounting to Rs. 16,99,714/- u/s 11B of the Central Excise Act, 1944 has been granted. The revenue has raised two questions of law in the appeal, which read as follows:

"I. Whether the Hon'ble CESTAT has erred in allowing the refund, without considering provisions of limitation provided in Section 11B of the Central Excise Act, 1944?

II. Whether the Hon'ble CESTAT has erred in allowing the refund, without considering provisions of unjust enrichment provided in Section 11B of the Central Excise Act, 1944?"

2. The assessee purchased natural gas through a pipeline from Reliance Gas Transportation Infrastructure Ltd. (RGTEL). The transmission charges payable by the assessee to RGTEL were fixed by a statutory body, namely the Petroleum &

Natural Gas Regulatory Board. Between April, 2009 and May, 2010, RGTIL had provided to the assessee a taxable service u/s 65(105)(zzz) of the Finance Act, 1994. Invoices were raised by RGTIL upon the assessee on the basis of the tariff which was initially notified by the statutory board. Subsequently the initial tariff was subjected to downward revision by the statutory board. RGTIL had, however, in the meantime collected excess transmission charges from the assessee for the supply of natural gas. The difference was credited by RGTIL to the account of the assessee by raising credit notes. Tax had been initially remitted by RGTIL on the basis of the original tariff fixed by the board. Since the tariff had been revised downward, the assessee applied for the refund of a proportionate part of the service tax remitted by RGTIL and which was borne by the assessee. The taxable service in question was "transport of goods other than water through pipeline and other conduit."

3. Initially, by an order dated 5 April, 2011, the Assistant Commissioner, Service Tax Division-V rejected the refund application on the ground that the application should have been made to the Commissionerate within whose jurisdiction the applicant operated.

4. The claim was thereafter preferred to the Assistant Commissioner, Bareilly. On 23 December, 2011, the Assistant Commissioner, Bareilly sanctioned the refund. However, an appeal was filed by the revenue which was allowed by the Commissioner (Appeals), Meerut on 16 April, 2012. The Commissioner (Appeals) reversed the order of the adjudicating authority only on the ground that the refund claim was filed by the recipient of the service and not by the service provider and that the expression "any person" in Section 11B of the Central Excise Act, 1944 does not include the recipient of the service. The assessee filed an appeal before the Tribunal. The Tribunal by the impugned judgment and order dated 5 December, 2013 followed the decision of a Constitution Bench of the Supreme Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, and held that the claim for refund of excess service tax paid was maintainable at the behest of the assessee who had borne the burden of the service tax. Consequently, the Tribunal was of the view that upon the downward revision of the transmission charges payable by the assessee to RGTIL in terms of the determination made by the statutory board, the assessee was entitled to maintain the refund application. The appeal was accordingly allowed and the order of the Commissioner (Appeals) was set aside.

5. As noted above, two questions of law have been raised on behalf of the revenue. The first question which falls for determination is whether the Tribunal had erred, as the revenue would assert, in allowing the refund claim without considering the issue of limitation u/s 11B of the Central Excise Act, 1944.

6. In dealing with this submission, it would be necessary to note at the outset that the Assistant Commissioner, Bareilly while sanctioning the refund claim in his order dated 23 December, 2011 specifically came to the conclusion that the claim had been filed within a period of one year as prescribed by Section 11B of

the Central Excise Act, 1944. The revenue challenged the order of the adjudicating authority before the Commissioner (Appeals). The grounds of appeal have been reproduced in the order of the Commissioner (Appeals). Those grounds would indicate that the revenue did not challenge the finding of the adjudicating authority to the effect that the application for refund had been preferred within the period of one year prescribed by Section 11B. As a matter of fact, the grounds would indicate that the principle, if not the only challenge on the part of the revenue was that the assessee, which was a recipient of the service and not the service provider, was not entitled to file a refund claim u/s 11B. The case of the revenue was that it was the service provider, namely RGTIL which alone was entitled to file a claim before the Commissionerate concerned and RGTIL had recovered the service tax amount from various recipients.

7. This contention was accepted by the Commissioner (Appeals). The assessee filed an appeal before the CESTAT. No cross objections were filed by the revenue. Hence, the record would indicate that the finding of the adjudicating authority to the effect that the claim was within the limitation was not challenged by the revenue in the first appeal which was filed before the Commissioner (Appeals). That being the position, it would not be open to the revenue to now assert to the contrary and to urge a point which was not raised in the grounds of appeal filed by the revenue while assailing the order of the adjudicating authority sanctioning the refund.

8. In Commissioner of Customs, Mumbai Vs. Toyo Engineering India Limited, the Supreme Court has held that the revenue could not be allowed to raise submissions for the first time in a second appeal before the Tribunal.

9. The same principle has been followed by a Division Bench of this Court in M/s. Bajaj Hindusthan Ltd. Vs. Union of India and Others, in holding that in an appeal before this Court, a ground which was not raised before and decided by the Tribunal, would not be permitted to be urged.

10. In our view, once the finding of the adjudicating authority that the claim for refund was filed within the period of limitation of one year u/s 11B was not challenged by the revenue before the first appellate authority, such a ground cannot be urged for the first time in an appeal before this Court. As a matter of fact, the ground was not even urged in the form of a cross objection before the Tribunal.

11. The second question of law which is sought to be raised is whether the refund application was barred by principles of unjust enrichment as provided in Section 11B and whether the Tribunal has allowed the refund without considering this aspect.

12. On this aspect, it would, at the outset, be necessary to note that a finding of fact was entered by the Assistant Commissioner, Bareilly to the effect that the final product urea which is manufactured by the assessee, which was the recipient of the service, is exempted from payment of excise duty and the value

of the fertilizer is fixed by the State. Hence, it has been held that the burden of duty had been borne by the assessee as a service recipient and the question of unjust enrichment did not arise.

13. As we have noted earlier, the Commissioner (Appeals) reversed this finding holding that it is only the service provider, namely RGTIL which could have filed a refund claim. As a matter of fact, the grounds of appeal before the Commissioner (Appeals) would indicate that the principle, if not the sole contention of the revenue, was that the assessee was the recipient of service and the service recipient is not entitled to file a refund claim u/s 11B. This submission is clearly in the teeth of the law laid down by the Supreme Court in *Mafatlal Industries Ltd.* (supra). The principle which has been enunciated in the judgment is as follows:

"(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 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 the amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition..."

14. The Tribunal was clearly, in our respectful view, correct and justified in following this principle. The assessee is the recipient of the taxable service provided by RGTIL and had borne the incidence of service tax. Hence, the assessee is entitled to claim a refund of excess service tax paid consequent upon the downward revision of the transmission charges payable by the assessee to RGTIL in terms of the determination made by the Regulatory Board. The entire record would indicate that the only objection of the revenue was to the maintenance of the refund application at the behest of the assessee. The fact that the assessee has not passed on the burden has been amply established in the order of the adjudicating authority. This finding was not challenged by the revenue in the grounds of appeal before the first appellate authority or for that matter in the form of cross objections before the Tribunal. The finding of fact of the first appellate authority to the effect that the prices of urea are prescribed by the Government and that the final product manufactured by the assessee is exempted from the payment of excise duty and there would be no occasion for

unjust enrichment has not been questioned.

15. In that view of the matter, we find no reason to entertain the appeal by the revenue which has not raised any substantial question of law. The appeal shall, accordingly, stand dismissed. There shall be no order as to costs.