

(2009) 08 UK CK 0010

In the Uttarakhand High Court

Case No : MCC Miscellaneous Application No. 317 of 2009 in Writ Petition No. 2562 of 2007 (MS)

Dish TV India Limited and Another

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

Date of Decision : 04-08-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B
Constitution of India, 1950 — Article 265
Customs Act, 1962 — Section 27, 27(1)

Citation : (2009) 08 UK CK 0010

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : Vipul Sharma, for the Appellant; L.P. Naithani, as A.G., for the Respondent

Final Decision : Allowed

Judgement

Sudhanshu Dhulia, J.—The Applicant / Petitioner had challenged the levy of entertainment tax by the. State, which was being realized under UP. Entertainments and Betting Tax Act, 1979 (from hereinafter referred to as the Act). The writ petition of the Petitioner was decided vide order dated 26th November, 2008* along with other writ petitions. The issue in those writ petitions was that the Petitioners were providers of a Direct to Home Service (hereinafter referred to as DTH Service), which is done through a Satellite network and there is no provision for levy of entertainment tax from the Petitioners under the Act and therefore the levy and the consequent recovery of entertainment tax from the Petitioners has no authority of law. There were other grounds as well raised by the present Petitioner and other Petitioners in the said Bunch of writ petitions, all of which may not be a relevant discussion for our purposes.

2. What is however, relevant is that those writ petitions were decided in favour of the Petitioners by the judgment of a Learned Single Judge dated 26th November,

2008, whereby it was held that since there is no provision under the U.P. Entertainments and Betting Tax act, 1979 for levy and recovery of entertainment tax from the Petitioners, who provide DTH service, hence such levy and recovery is bad in the eyes of law. In short, the writ petitions were allowed. A Special Appeal bearing Special Appeal No. 23 of 2009 filed by the State against the said judgment of the Learned Single Judge was also dismissed.

3. A statement has also been made by the Learned Advocate General of the State Mr. L.P. Naithani that an SLP filed against the judgment of this Court before the Hon"ble Apex Court has also been dismissed.

4. What remains then I What remains all the same, is the fate of a "bank guarantee" deposited by the Applicant / Petitioner as a security by orders of this Court. As it happened at the time of admission of the writ petition filed, an interim order was granted by the Learned Single Judge of this Court with certain conditions on 31st December, 2007. The portion of that order, which is relevant for our purpose must be referred to as follows:

Considering the deposit made by the Petitioners in Pithoragarh district to the tune of Rs. 19,64,000/- and taking into consideration the details of other districts of Champawat, Udham Singh Nagar and Nainital given by the Petitioners at Page-V to the writ petition, if the Petitioners furnish Bank Guarantee worth Rs. 15,00,000/- (fifteen lacs) in favour of the Registrar General of this Court within a period of two weeks, the Respondents are restrained from proceeding further in the matter against the Petitioners.

Stay application is disposed of accordingly.

5. In compliance with the order of the Learned Single Judge, a bank-guarantee was furnished by the Applicant/Petitioner to the tune of Rs. 15,00,000/- in favour of the Registrar General of this Court. Now, since the Petitioners have succeeded in their writ petitions, they have moved an application for discharge of the bank-guarantee and for returning the bank guarantee to the Petitioner / Applicant. It is this application of the Applicant/Petitioner, which is before this Court and which is vehemently opposed by the Learned Advocate General of the State Mr. LP. Naithani.

6. Learned Advocate General of the State apart from stating that the matter is pending in SLP before the Hon"ble Apex Court (which has since been dismissed according to the Advocate General) stated two grounds in his objections, these grounds, which have been stated in his objection are narrated as follows:

(a) When the petition was heard there was no plea taken by the Petitioner that the tax which has already been imposed and was being realized should be refunded. The Petitioners also did not take these pleas in the special appeal for refund.

(b) By means of the present application, the Petitioners have made a request for refund for such amount, which is in shape of bank guarantee. Under the scheme

of U.P. Entertainment and Betting Tax Act 1979, a principle operator is granted a licence under the Act to deliver entertainment to the consumer through some franchise and gives right to them to provide the entertainment to the consumer for which the principle operator like the Petitioner enters to an agreement with the franchisee and realized the dues from these franchise. The franchise in their own realized the amount from the consumers by imposing fees on them. As such, ultimately burden falls on the consumers to pay the tax. The doctrine of unjust enrichment does not entitle the Applicant to refund. Further, the doctrine of unjust enrichment does not apply to State.

7. In short, the first objection was that there being no plea by the Petitioners before the Learned Single Judge or before the Division Bench that the tax which has already been imposed and realized should also be refunded, no relief can be granted by means of this application. The second ground is of "unjust enrichment" of the Petitioners and it is said that the amount cannot be refunded to the Petitioners as such amount has already been realized by the Petitioners from the consumers, which cannot be paid by him and therefore, it is in the best interest that this amount should be retained by the State.

8. In the considered view of this Court, the argument being raised by the Learned Advocate General and the objections made by him against the prayer for the return of the bank-guarantee are not only just misconceived but also unreasonable ! Firstly it is not a question of refund of tax ! It is simply a case of return of a bank-guarantee and a plea for discharging of the liability of bank guarantee, which is an issue here. It is not a "refund" of tax already paid hence, there was no question of Petitioners making such a plea in the writ petition or the Applicant of the Petitioners not being maintainable on this ground as is being objected. The second objection is an issue of unjust enrichment, which has been raised by the Learned Advocate General. Since it is not a question of "refund" of tax, the principle of doctrine of unjust enrichment is not applicable in the present case. The arguments, to the contrary, raised by the Learned Advocate General are entirely misplaced. The law on this subject is crystal clear and there is no scope of any ambiguity.

9. A little elaboration on this though may be helpful. It is indeed true that a Constitution Bench of the Honble Supreme Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, has held that even if a tax is declared to be illegal even then in such a case refund of tax cannot be made automatically as a matter of right, but it has to be done in accordance with the law and the procedure prescribed under the law, and the issue of unjust enrichment has to be examined.

10. This position has been reiterated by the Hon"ble Supreme Court in *Shree Digvijay Cement Co. Ltd. and Another Vs. Union of India (UOI) and Another*, , which is heavily relied upon by the Learned Advocate General. It is true that in the Constitution Bench judgment as well as in *Shree Digvijay Cement (supra)*, the Hon"ble Supreme Court has reiterated the applicability of principle of unjust

enrichment in a case of refund of tax. This position of law is clearly articulated in *Shree Digvijay Cement Company Ltd. (supra)* by the Supreme Court while referring to the Constitution Bench of the Hon''ble Apex Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, ,* where it is stated that "There is no automatic right of refund. In *Mafatlal Industries Ltd. v. Union of India* the Constitution Bench has held that the right to refund of tax paid under an unconstitutional provision of law is not an absolute or an unconditional right. Similar is the position, even if Article 265 can be invoked. The principles of unjust enrichment are applicable in the claim of refund. The claimant has to allege and establish that he has not passed on the burden to another person. The Constitution Bench has held 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 requirement as explained in the judgment. Where the burden of duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. Real loss or prejudice is suffered in such a case by the person who has ultimately 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. The doctrine of unjust enrichment is a just and salutary enriching a person. The doctrine of unjust enrichment for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State for the state represents the people of country. No one can speak of the people being unjustly enriched.

11. It is on this argument stated above that the Learned Advocate General has opposed the application of the Petitioners stating that the return of a bank guarantee and discharge of the Petitioners' liability would amount to unjust enrichment of the Applicants/Petitioners. This argument is simply not tenable. No one can deny the applicability of the doctrine of unjust enrichment in a case of refund, as that would be the law of the land. However, it is the applicability of that "principle" in the present case, which is wholly misplaced. The refund or the return or discharge of the bank guarantee does not amount to refund of a tax. The Hon''ble Apex Court in *Oswal Agro Mills Ltd. v. Assistant Collector of C. Ex. Ludhiana* reported in 1994 (70) E.L.T. 48 (S.C.) has clarified this principle wherein it has been stated that furnishing of a bank-guarantee that too by an order of a Court is not equivalent to payment of tax and therefore, the principles of doctrine of unjust enrichment is not applicable in such a case. This position needs to be clarified here in the words of the Hon''ble Supreme Court. Relevant paragraph 10 of the aforesaid judgment reads as under:

10. The question, therefore, is whether it can be said that the furnishing of a bank guarantee for all or part of the disputed exercise duty pursuant to an order of the court is equivalent to payment of the amount of excise duty. In our view, the answer is in the negative. For the purposes of securing the Revenue in the event of the Revenue succeeding in proceedings before a Court, the Court, as a

condition of staying the demand for the disputed tax or duty, imposes a condition that the Assessee shall provide a bank guarantee for the full amount of such tax or duty or part thereof. The bank guarantee is required to be given either in favour of the principal administrative officer of the Court or in favour of the concerned Revenue authority, in the event that the Revenue fails in the proceedings before the Court the question of payment of the tax or duty, the amount of which is covered by the bank guarantee, does not arise and, ordinarily, the Court, at the conclusion of its order, directs that the bank guarantee shall stand discharged. Where the Revenue succeeds the amount of the tax or duty becomes payable by the Assessee to the Revenue and it is open to the Revenue to invoke the bank guarantee and demand payment thereon. The bank guarantee is security for the Revenue, that in the event the Revenue succeeds its dues will be recoverable, being backed by the guarantee of a bank. In the event, however, unlikely, of the bank refusing to honour its guarantee it would be necessary for the Revenue or, where the bank guarantee is in favour of the principal administrative officer of the Court, that officer to file a suit against the bank for the amount due upon the bank guarantee. The amount of the disputed tax or duty that is secured by a bank guarantee cannot, therefore, be held to be paid to the Revenue. There is no question of its refund, and Section 11B is not attracted.

12. This position of law has been reiterated in a catena of decisions by various High Courts. Reference may be made here of the decision of Division Bench of the Madras High Court in Commissioner of Customs (Export), Chennai-1 v. Cable Corporation of India Ltd. reported in 2008 (229) E.L.T. 212 (Mad.).

13. Although the issue before the various High Courts was common i.e. the refund or return of the bank guarantee the matters were different i.e. pertaining to different tax statutes. However, since the principle is common, reference of these cases may be necessary here of the Division Bench of the Madras High Court in Commissioner of Customs (Export), Chennai-1 v. Cable Corporation of India Ltd. reported in 2008 (229) E.L.T. 212 (Mad.), where the Division Bench has held as follows:

4. The issue involved in the present case are squarely covered by the decision in the case of Commissioner of Customs, Chennai v. Aristo Spinners Ltd., 2008 (226) E.L.T. 42 (Mad.) : (2008) 4 TNJL 517 decided by a Division Bench of this Court in which one of us (KPPJ) is a party, relying on the judgment of the Division Bench in which both of us are parties in the case of Commissioner of Customs (Exports) v. M/s Jraj Exports (P) Ltd., 2007 (217) E.L.T. 504 (Mad.) : 2007 (3) TNLJ 532, wherein we have held that the bank guarantee cannot be regarded as equivalent to payment of duty and it is only furnished to safeguard the interest of the Revenue in case of non-fulfillment of export obligation. Section 27 which speaks about the refund of the duty cannot be pressed into service to deny refund of the amount covered under the bank guarantee which has been negotiated by the department. In the decision in the case of Jraj Exports (P) Ltd.,

referred to supra, this Court has taken in aid the judgment of the Apex Court in the case of Oswal Agro Mills Ltd. and Another Vs. Asstt. Collector of Central Excise, Division Ludhiana and Others, .

14. In another case of Commissioner of Cus. (Exports), Chennai v. Jraj Exports (P) Ltd. 2007 (217) E.L.T. 504 (Mad.), the Division Bench of Madras High Court has stated that furnishing of a bank guarantee is not payment of duty but is only security to safeguard the interest of revenue and nothing more than that. The issue was again a refund of an amount, which was given by the Petitioner as a bank guarantee. The claim of refund of bank guarantee was rejected by the Deputy Commissioner of Customs (Refund) on the ground that as per the provisions of Section 27 of the Customs Act, a person claiming refund of any duty or interest, if any, paid on such duty would make an application for refund of such duty and interest paid on such duty to the Assistant Commissioner or Deputy Commissioner before the expiry of six months from the date of payment of such duty and since this time has expired the bank guarantee was not returned or refunded back. On this, the Division Bench of Madras High Court has stated as follows:

4. From the facts narrated above, it is a case where the Appellant's request for refund of the bank guarantee wrongly encashed was rejected on the ground that the claim is time barred. The case of the Appellant has to be rejected on two grounds, firstly on facts. It is evident from the records that the bank guarantee was invoked and the amount was credited to the Customs Treasury on 1-4-2004. The first Respondent produced the Export Obligation discharge certificate obtained from the Director General of Foreign Trade on 16-4-2004, based on which the Appellant duly cancelled the bond and the Bank guarantee during the month of August 2004. When the department accepted the fulfillment of export obligation and the export obligation discharge certificate issued by the Director General of Foreign Trade, there is no need either to invoke the bank guarantee or retain the amount, which has already been credited in the department account or invocation of the bank guarantee and the technical plea that the refund of the amount cannot be granted as the claim made is barred by limitation u/s 27(1)(b) of the Customs Act also cannot be legally sustainable. The furnishing of bank guarantee in order to fulfil the export obligation cannot be regarded as "payment of duty" which the first Respondent is liable to pay. The Supreme Court in the case of Oswal Agro Mills Ltd. and Another Vs. Asstt. Collector of Central Excise, Division Ludhiana and Others, held that furnishing of bank guarantee pursuant to an order of the Court is not equivalent to payment of excise duty. For the purpose of securing the revenue in the even of revenue succeeding in the proceedings before a Court, the Court as a condition of staying the demand for the disputed tax or duty, imposes a condition that the Assessee shall provide a bank guarantee for the full amount of such tax or duty or part thereof. The bank guarantee is a security for the revenue that in the even the revenue succeeds its dues will be recoverable being backed by the guarantee of a bank. The amount of the disputed tax or duty that is secured by a bank guarantee cannot therefore,

be held to be paid to the revenue. Thus, as per the Supreme Court Judgment, the bank guarantee given for due performance of the export obligation cannot be regarded that the first Respondent paid the amount which they would have paid in the circumstances of non-performance of the export obligation. Hence the reason stated that the demand was made beyond the period prescribed u/s 27(1) (b) of the Customs Act has to be rejected.

15. Similarly in *Commissioner of Customs, ICD, TKD, Delhi v. CEGAT, New Delhi* reported in 2005 (179) E.L.T. 394 (Del.) The Division Bench of Delhi High Court has also held that the amount of money, which has been given as a bank guarantee cannot be held to be a revenue paid to the State and since this is not a revenue, there is no question of its refund under the provisions of the Act and therefore, the provisions relating to the refund of such an amount are not attracted in such a case. Relevant paragraphs 9,10 and 11 read as under:

9. Insofar as the contention raised by the Learned Counsel for the revenue that the Tribunal could not have granted refund is concerned, it is required to be noted that, in fact, there is no refund but the direction is given to the effect that the amount be returned to the Petitioner and the Petitioner is directed to furnish the bank guarantee of the same amount, namely, Rs. 12.77 crores so as to maintain status quo ante in view of the order made by the High Court earlier. Our attention was invited to the decision of the Supreme Court in the case of *Oswal Agro Mills Ltd. v. Assistant Collector, Central Excise, Ludhiana*, 1994 (7) E.L.T. 48 (S.C.). The Court considered the arguments with regard to Section 11B of the Central Excise and Salt Act, 1944 which is pari material to Section 27 of the Customs Act. The court pointed out as under in Paragraph 10 thereof-

10. The question, therefore, is whether it can be said that the furnishing of a bank guarantee for all or part of the disputed excise duty pursuant to an order of the court is equivalent to payment of the amount of excise duty. In our view, the answer is in the negative. For the purposes of securing the Revenue in the even of the Revenue succeeding in proceedings before a Court, the Court, as a condition of staying the demand for the disputed tax or duty, impose a condition that the Assessee shall provide a bank guarantee for the full amount of such tax or duty or part thereof. The bank guarantee is required to be given either in favour of the principal administrative officer of the Court or in favour of the concerned Revenue authority. In the event that the Revenue fails in the proceedings before the Court the question of payment of the tax or duty, the amount of which is covered by the bank guarantee, does not arise and, ordinarily, the Court, at the conclusion of its order, directs that the bank guarantee shall stand discharged. Where the Revenue succeeds the amount of the tax or duty becomes payable by the Assessee to the Revenue and it is open to the Revenue to invoke the bank guarantee and demand payment thereon. The bank guarantee is security for the Revenues, that in the even the Revenue succeeds its dues will be recoverable, being backed by the guarantee it would be necessary for the Revenue or, where the bank guarantee is in favour of the

principal administrative officer of the Court, that officer to file a suit against the bank for the amount due upon the bank guarantee. The amount of the disputed tax or duty that is secured by a bank guarantee cannot, therefore, be held to be paid to the Revenue. There is no question of its refund and Section 11B is not attracted.

10. Thus, it is clear that the amount of disputed duty, i.e., secured by the bank guarantee, therefore, cannot be held to be paid to the Revenue. There is no question of its refund and, therefore, Section 11B (Section 27 in this case) is not attracted.

16. The Hon''ble Apex Court in *Somaiya Organics v. State of Uttar Pradesh* reported in 2001 (130) E.L.T. 3 (S.C.) has applied the principles of unjust enrichment in case of refund of an amount which was given as a duty, which was held to be illegal on the ground that since such an amount has already been received by a person, a refund of such an amount would amount to unjust enrichment. But what is important here is that while denying such an amount, the Hon''ble Apex Court has excluded the bank guarantee as it cannot be regarded as a payment of excise levy. The Hon''ble Apex Court has stated as under:

33. Furthermore in view of the enunciation of the law by this Court in *Oswal Agro Mills Ltd. case* (supra), a bank guarantee which is furnished cannot be regarded as payment of excise levy which the Government is entitled to retain. The furnishing of a bank guarantee is ordered normally in order to ensure collection of dues. Where, however, the State, as in the present case, has been held not to be entitled to collect or realize vend fee after 25th October, 1989 it cannot be allowed to invoke the bank guarantee and realize the amount of vend fee. What cannot be done directly cannot be done indirectly either. Furnishing of bank guarantee is only a promise by the bank to pay to the beneficiary the amount under certain circumstances contained in the bank guarantee. Furnishing of bank guarantee cannot tantamount to making of payment as it was to avoid making payment of the vend fee that bank guarantees were issued. The Respondents, in other words, are not entitled to encash the bank guarantees and realize the vend fee in respect of the period prior to 25th October, 1989.

17. In short therefore, the objection to the application filed by the Applicant / Petitioner is rejected. The Application stands allowed. The Registrar General of the High Court is directed to refund / return the bank guarantee given by the Applicants in compliance of the order dated 31st December, 2007, to the Appellant/ Petitioner forthwith.