

**(2015) 07 KL CK 0042**  
**In the High Court Of Kerala**  
**Case No : WP(C). No. 18126 of 2015 (M)**

Geojit BNP Paribas Financial Services Ltd. APPELLANT  
Vs  
Commissioner of Central Excise Customs and Service Tax and RESPONDENT  
Others

**Date of Decision :** 06-07-2015

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 11B, 11B(1), 12A  
Finance Act, 1994 — Section 83

**Citation :** (2015) 3 KLJ 712 : (2015) 39 STR 706 : (2015) 85 VST 76

**Hon'ble Judges :** A. Muhamed Mustaque, J

**Bench :** Single Bench

**Advocate :** Jose Jacob, for the Appellant; Ranjith Jacob Koshy and Thomas Mathew Nellimootil, SCs, Advocates for the Respondent

## Judgement

A. Muhamed Mustaque, J.—The petitioner is a company engaged in providing retail financial services like share stock and share brokering, marketing of IPO of companies and mutual funds, corporate advisory services etc. They have approached this Court challenging an order rejecting their claim for refund of the amount paid mistakenly as service tax.

2. The petitioner, for the payment received from the Bank of Muscat SAOG for the service rendered, remitted service tax amounting to Rs. 1,72,339/- for the period from April 2012 to March 2013. They made an application for refund of service tax for the reason that they need not pay the same, since the recipient of such service was located outside India and the payment received was in convertible foreign exchange which qualifies as export of service. The application was submitted on 23/2/2015. The said application was rejected by Ext. P7 order stating that it was filed beyond one year from the relevant date. This order is under challenge before this Court.

3. The claim was rejected citing Section 11B(1) of the Central Excise Act, 1944 which is made applicable to service tax purposes by virtue of Section 83 of the

Finance Act, 1994. In this case, payments were made on 6/7/2012, 5/10/2012, 5/1/2013 and 28/3/2013. It was found that since the refund claim was submitted only on 24/02/2015, it was barred by limitation and therefore, the petitioner is ineligible for refund of the amount claimed.

4. Section 11B of the Central Excise Act is quoted below for convenient reference:

"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 him to any other person.

..... "

5. The question that arises is whether the petitioner is entitled for refund of the amount claimed after one year from the relevant date apart from the question relating to alternate remedy available to the petitioner.

6. It was found in the impugned order that the payment received by the petitioner is not chargeable to tax. The reason given is as follows:

"Section 66B envisages taxation of services rendered in the taxable territory. Whether a particular service is rendered in the taxable territory or not is a matter to be determined in terms of Place of Provision Rules, 2012. As per rule 3 of the said Rules, which is the relevant Rule applicable in the instant case, the place of provision of service is the location of the service recipient. In the instant case the recipient is BankMuscat SAOG and their location is Sultanate of Oman. Thus the services have been rendered outside the taxable territory and hence are not chargeable to tax."

Therefore, the payment made by the petitioner is purely by a mistake and not relatable to payment under service tax.

7. The learned counsel Mr. Jose Jacob appearing for the petitioner, relying on the judgment of the Division Bench of the Karnataka High Court in Commr. of C. Ex. (Appeals), Bangalore Vs. Kvr Construction , would argue that when service tax is paid mistakenly, Section 11B of the Central Excise Act has no application. It is apposite to refer the dictum of the above judgment at para.23, which reads as follows:

"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 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."

8. The learned counsel for the Department, relying on the judgment of the Hon'ble Supreme Court in *Mafatlal Industries Ltd. and Others Vs. Union of India* (UOI) and Others, (2002) 83 ECC 85 : (1997) 68 ECR 273 : (1997) 89 ELT 247 : (1996) 11 JT 283 : (1996) 9 SCALE 457 : (1997) 5 SCC 536 : (1996) 10 SCR 585 Supp : (1998) 111 STC 467 would argue that even if the payment was made under a mistake, the refund can only be processed in terms of Section 11B of the Central Excise Act. In the above case, the Apex Court elaborately classified claim for refund into three groups or categories, vis-à-vis, (i) unconstitutional levy, (ii) illegal levy and (iii) mistake of law, and held that the remedies involved in all the three categories are the remedies provided under the Excise and Customs Act. None of the above categories would attract to the case in hand. In this case, the levy was purely on account of mistake of fact in understanding the law. The petitioner assumed that the transaction for which he has paid tax, is covered under the law. The law does not cover such transaction for payment of service tax. Therefore, it is not on account of any mistake of law but mistake of fact the service tax was paid. In that view of the matter it has no colour of tax for the purpose of levy by the Department. The distinguishing feature for attracting the provisions under Section 11B is that the levy should have the colour of validity when it was paid and only consequent upon interpretation of law or adjudication, the levy is liable to be ordered as refund. When payment was effected, if it has no colour of legality, Section 11B is not attracted. This Court is also of the view that levy is not in accordance with the provisions of the service tax and therefore, such payment cannot be taken as a payment made relatable to Section 11B of the Central Excise Act.

9. The learned Standing Counsel for the Department would further argue that the petitioner has an alternative remedy and therefore, the writ is not maintainable.

10. The question of alternative remedy would arise if service tax is otherwise leviable under the Central Excise Act. Herein, in this case, there is no dispute with regard to the fact that no service tax is leviable for the service extended by the petitioner to the Muscat Bank SAOG. Thus, the writ petition is maintainable when the amount is arbitrarily withheld without any justification under law as the refund claimed by the petitioner is not relatable to Section 11B of the Central Excise Act. Similar view was also taken by the Karnataka High Court in *K.V.R. Constructions Vs. Commissioner of Central Excise*, (2010) 17 STR 6 : (2010) 25

STT 436 : (2010) 28 VST 190 and by the Madras High Court in Natraj and Natraj and Venkat Associates Vs. Assistant Commissioner, Service Tax, (2010) 249 ELT 337 : (2010) 17 STR 3 : (2010) 26 STT 232 .

11. In that view of the matter, the writ petition is allowed. There shall be a direction to the second respondent to sanction, refund claimed by the petitioner based on the request made by him within two months from the date of receipt of a copy of this judgment. No costs.