
(2016) 09 AHC CK 0283

In the Allahabad High Court

Case No : Civil Misc. Writ Tax Petition No. 578 of 2016

M/s Ebiz.Com Pvt. Ltd.

APPELLANT

Vs

Commissioner of Central Excise, Customs and Service

RESPONDENT

Date of Decision : 12-09-2016

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B and Section 35F
Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 73(1), Section 75
Service Tax Rules, 1994 — Rule 6

Citation : (2017) 2 ADJ 831

Hon'ble Judges : Sudhir Agarwal and Dr. Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : Chandra Kumar Rai and J.K. Mittal, Advocates, for the Petitioner;
C.S.C. and Krishna Agarawal, Advocates, for the Respondent

Final Decision : Allowed

Judgement

1. Heard Sri J.K. Mittal and Sri Chandra Kumar Rai, learned counsel for petitioner and Sri Krishna Agarwal, learned counsel for respondents.

2. This writ petition has been filed under Article 226 of Constitution of India seeking a writ of mandamus directing respondents to refund amount of excess paid "Service Tax", by petitioner, and retained by respondents, unauthorisedly and illegally, along with interest at the rate specified under Section 11B read with Section 35F of Central Excise Act, 1944 (hereinafter referred to as "Act, 1944").

3. The brief factual matrix giving rise to present dispute is that M/S EBIZ.COM PVT LTD (hereinafter referred to as "Assessee") is engaged in business of developing and selling various online/off line educational software packages. It is also providing holiday accommodation booking packages. It is registered with Service Tax Department since 2001.

4. On 12.01.2007 an Anti-Evasion Branch of Central Excise Department, Noida

headed by Deputy Commissioner (A.E.) conducted search in petitioner's premises and got deposited Service Tax of Rs. 25,55,000/-. Petitioner was also forced to pay interest of Rs. 2,59,000/- on 29.03.2007.

5. Thereafter a show cause notice dated 03.07.2007 was issued by Additional Commissioner Central Excise, Noida (hereinafter referred to as "ACCE") demanding "Service Tax" on handling charges. Assessment was finalized by ACCE vide order dated 31.12.2007 confirming pay-ability of "Service Tax" of Rs. 25,55,000/- and interest of Rs. 2,59,000/- under Section 75. It further imposed penalty under Section 76, 77 and 78 of Finance Act, 1994.

6. Petitioner on 02.02.2008 deposited an amount equivalent to 25% of penalty, imposed under Section 78 of Finance Act, 1994.

7. Against order dated 31.12.2007, petitioner preferred Appeal No. 99/CE/APPI/NOIDA/08 but same was dismissed by Commissioner (Appeals) vide order dated 29.08.2008. Thereafter, further Appeal No. ST/748/2008 was filed by petitioner before Central Excise Service Tax Appellate Tribunal (hereinafter referred to as "Tribunal") which was allowed vide judgment and order dated 23.12.2012. Tribunal remitted matter back to Commissioner (Appeals) to rehear and decide.

8. Commissioner (Appeals), thereafter, vide order dated 29.08.2012, allowed appeal and set aside order dated 31.12.2007 whereby "Service Tax" along with interest and penalty were imposed by ACCE. Order dated 29.08.2012 passed by Commissioner (Appeals) was communicated to Superintendent (Range-I) vide letters dated 02.04.2013, 06.06.2013 and 03.01.2014, requiring to refund entire amount deposited by petitioner under coercion exercised by respondents' authorities.

9. Despite personal visits, when petitioner did not receive any refund, he filed a refund claim on 27.01.2014 for Rs. 34,51,500/- in the office of Commissioner Central Excise, Customs and Service Tax, Noida (hereinafter referred to as "Commissioner (CECST)"). Superintendent (Refund) Noida, wrote a letter dated 25.02.2014, requiring petitioner to submit some documents and also to file refund application in Form-R. No such form existed having been repealed long back. Other documents demanded were submitted by petitioner vide letter dated 25.02.2014. Petitioner sent reminder dated 25.03.2014 and reply dated 01.04.2014 to 3 Superintendent (Refund) reminding that refund has to be granted within three months in terms of Board's Circular dated 08.12.2014.

10. Deputy Commissioner (Service Tax) issued a show cause notice dated 02.04.2014 requiring petitioner to show cause why refund claim be not rejected under Section 11B of Act, 1944 read with Section 83 of Finance Act, 1994 for the reason that refund claim ought to have been made within one year but not so made.

11. Petitioner then made a lot of correspondence with respondents. Further no any decision was taken by Deputy Commissioner (Service Tax) after serving

notice which was duly replied by petitioner, hence this writ petition.

12. Respondents have filed a counter affidavit stating that petitioner paid "Service Tax" voluntarily. It is also said that Section 11B of Act, 1944 would not be applicable since "Service Tax" was deposited voluntarily and not under protest. It is also said that interest was also deposited by petitioner on his own since it was his legal obligation. Against Commissioner's order dated 29.08.2012, department reviewed matter and filed appeal before Tribunal which is pending. Since petitioner never filed any application for refund in accordance with Section 11B (3) of Act, 1944, hence respondents can not entertain any claim of refund, and, no refund claim of petitioner, in law, is pending with respondents. No refund is due, automatically. Moreover, order of Commissioner (Appeals), dated 29.08.2012, is not final since appeal is pending before Tribunal. Board's Circular dated 08.12.2014 deals with amount deposited under Section 35F while in the present case it is Section 11B which will be applicable. Since petitioner never filed application as prescribed under Section 11B, hence no mandamus for refund is permissible.

13. The issue is simple though sought to be made complex, and it is, "Whether petitioner is entitled for refund, and if yes, whether also 4 entitled for interest thereon."

14. The undisputed facts are that show cause notice dated 03.07.2007 was issued to petitioner to show cause why "Service Tax" of Rs. 25,55,000/- for the period of July 2003 to January 2006 should not be recovered from him under Section 73(1) of Finance Act, 1994, under extended period of limitation. It was also stated that since this amount was already paid, same may be appropriated. Further, notice required to show cause why interest of Rs. 2,59,000/- as per Rule-6 of Service Tax Rules, 1994 read with Section 75 of Finance Act, 1994 may not be recovered from petitioner. Since it was already paid voluntarily, why the same should not be appropriated.

15. The facts stated by Revenue in notice dated 03.07.2007 that petitioner's deposit already made, why be not appropriated, shows that on that dated, Revenue was clear in its understanding that money lying with them does not belong to them, but they are, at the best, custodian and in fact money belong to petitioner. Till it is not appropriated, it was in the nature of deposit or pre-deposit. The Adjudicating Authority thereafter passed order confirming aforesaid demand and appropriating amount already deposited by petitioner towards "Service Tax" and interest on "Service Tax". It is thus evident that petitioner had not deposited any "Service Tax" or interest but deposit of Rs. 25,55,000/- and Rs. 2,59,000/- was in the nature of pre-deposit which, subsequently, after confirming demand, was appropriated by Adjudicating Authority.

16. Commissioner (Appeals) found that under Section 65 (105) (zzb) of Finance Act, 1994, taxable service under category of "Business Auxiliary Services" cover only service provided or to be provided to client, by any person in relation to

"Business Auxiliary Services" as defined under Section 65 (19) of the Finance Act, 1994. After considering nature of business etc., it held that petitioner was not engaged in providing any service to client in any manner in terms of 5 category defined under Section 65 (19) of Finance Act, 1994, hence not chargeable to "Service Tax" under category of "Business Auxiliary Services" under Section 65(105) (zzb) and demand of "Service Tax" along with interest and penalty was not justified. The demand of "Service Tax" and interest and appropriation of amount already deposited, against such demand rendered illegal and without any authority of law.

17. Apparently, in view of aforesaid facts, it can not be said that Section 11B Central Excise Act, 1944 has no application in the case in hand. Section 11B Central Excise Act, 1944 reads as under:-

"Section 11B Claim for refund of duty.-

(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 documents 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:

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 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 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 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 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 6 exported out of India;

(b) unspent advance deposits lying in balance in the applicant's current account

maintained with the Commissioner of Central Excise; "(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 paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

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

(f) the duty of excise 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 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 of 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 re-assembly, 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."

18. It is urged that amount got deposited from petitioner under coercion, pursuant to search conducted on 12.01.2007, and retained by respondents subsequent appropriation is illegal jurisdiction. The same is 7 liable to be refunded along with interest.

19. We have to examine, if there is any provision applicable to the facts of the case in dealing with the demand of petitioner for refund of the amount along with interest or whether in general law, petitioner can be held entitled to such relief.

20. If an amount is paid by an assessee, in duty of excise, pursuant to a liability created under a Statute or by statutory order, passed by competent authority, and such demand is later found illegal, Section 11 AB contemplates that amount received shall be refunded to assessee provided that the incidence of such duty had not been passed on by him to any other person.

21. In the present case, the amount in question, refund whereof is claimed, was not paid. It is not such amount of duty which was deposited by assessee. To check evasion of "Excise duty" or "Service Tax", raid was conducted on 12.01.2007, when during raid, sum of Rs. 25,55,000/- was got deposited. Amount of interest thereon was subsequently realized from petitioner on 29.03.2007 i.e. before issue of notice on 03.07.2007. Such deposit was involuntary by petitioner since no one shall deposit a huge money without creation of liability in law. Such an amount has been held to be a pre-deposit and principles of unjust enrichment has been held inapplicable in such cases.

22. In Commissioner of Central Excise, Coimbatore v. Pricol Ltd. 2015 (39) STR 190 (Mad.) of Division Bench of Madras High Court had an occasion to look into a similar dispute. Therein also payment was made during investigation by assessee. Subsequently, show cause notice was issued and Assessing Officer passed order adjudicating liability of Central Excise and amount deposited by Assessee was appropriated against such determined liability. Subsequently, in appeal, assessment order was set aside and question of refund arose. An argument was raised that unless Assessee prove that he has not passed on incidence of duty to any other person, refund cannot be allowed. Court held, it is not a case of refund of duty but return of pre-deposit made by Assessee at the time of investigation under protest. Similarly in the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at the time of investigation, as has been recorded in original proceedings itself. Court has said as under:-

" There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee."

23. It has been consistent view various Courts that any amount, deposited during pendency of adjudication proceedings or investigation is in the nature of deposit made under protest or pre-deposit and, therefore, principles of unjust enrichment would not be attracted.

24. Madras High Court in Commissioner of Central Excise v. Pricol Ltd. (supra) relied on a Bombay High Court judgment in Suvidhe Ltd. v. Union of India, 1996 (82) E.L.T. 177 (Bom.); Gujarat High Court judgments in Commissioner of

Customs v. Mahalaxmi Exports, 2010 (258) E.L.T. 217; Parle International Ltd. v. Union of India, 2001 (127) E.L.T. 329 (Guj.) and this Court's judgment in Summerking Electricals (P) Ltd. v. CEGAT, 1998 (102) E.L.T. 522 (All.).

25. Against the judgment of Bombay High Court in Suvidhe Ltd. (supra), Revenue preferred an appeal before Supreme Court but High Court's view was maintained. The said judgment is reported in Union of India v. Suvidhe Ltd., 1997 (94) E.L.T. A159 (S.C.).

26. We are also informed that following the judgment in Suvidhe Ltd. (supra), Central Board of Excise and Customs (hereinafter referred to as "CBEC") issued Circular No. 275/37/2K-CX.8A dated 02.01.2002 providing as under:-

"2. It would be pertinent to mention that the Revenue had recently filed a Special Leave Petition against Mumbai High Court's order in the matter of NELCO LTD, challenging the grant of interest on delayed refund of pre-deposit as to whether:

(i) the High Court is right in granting interest to the depositor since the law contained in Section 35F of the Act does in no way provide for any type of compensation in the event of an appellant finally succeeding in the appeal, and,

(ii) the refunds so claimed are covered under the provisions of Section 11B of the Act and are governed by the parameters applicable to the claim of refund of duty as the amount is deposited under Section 35F of the Central Excise Act, 1944.

The Hon'ble Supreme Court vide its order dated 26.11.2001 dismissed the appeal. Even though the Apex Court did not spell out the reasons for dismissal, it can well be constructed in the light of its earlier judgment in the case of Suvidhe Ltd. And Mahavir Aluminium that the law relating to refund of pre-deposit has become final.

3. In order to attain uniformity and to regulate such refunds it is clarified that refund applications under Section 11B(1) of the Central Excise Act, 1944 or under Section 27(1) of the Customs Act, 1962 need not be insisted upon. A simple letter from the person who has made such deposit, requesting the return of the amount, along with an attested Xerox copy of the order-in-appeal or CEGAT order consequent to which the deposit made becomes returnable and an attested Xerox copy of the Challan in Form TR6 evidencing the payment of the amount of such deposit, addressed to the concerned Assistant/Deputy Commissioner of Central Excise or Customs, as the case may be, will suffice for the purpose. All pending refund applications already made under the relevant provisions of the Indirect Tax Enactments for return of such deposits and which are pending with the authorities will also be treated as simple letters asking for return of the deposits, and will be processed as such. Similarly, bank guarantees executed in lieu of cash deposits shall also be returned."

27. Circular dated 02.01.2002 has been modified by subsequent Circular dated 20.06.2003 to the following effect:-

"It has been brought to the notice of the Board that the wordings in para 4 of the Circular, namely, "any deviation and resultant liability to interest on delayed refunds shall be viewed strictly" convey the impression that interest is liable to be granted for 10 refund of pre-deposits even when there is no corresponding provision in the Central Excise Act, 1944. The matter has been examined and the sentence is re-worded as under:- "Any deviation from the procedure explained herein above shall be viewed strictly."

28. There is one more Circular No. 802/35/2004-CX dated 08.12.2004 which provides that against an order where under refund is admissible to an assessee with regard to the pre-deposit, if an appeal is pending, that shall not be taken as justification for denying refund.

29. The question of interest on delayed deposit or refund pre-deposit came to be considered by Supreme Court in Commissioner of Central Excise, Hyderabad v. I.T.C. LTD. 2005 (179) E.L.T. 15 (S.C.). A statement was made on behalf of the Central Board of Excise and Customs by the Solicitor General of India that Board proposes to issue a circular in connection with the payment on all such pre-deposits. A draft copy of the circular was also handed over to the Supreme Court. In view thereof, Supreme Court decided the appeal holding as under:-

"Having regard to the contents of the draft circular we direct compliance with the final order impugned before us and payment of interest in terms of the draft circular. The draft circular shall be appended to and the contents form part of this order. The appeal is disposed of. In view of this order any judgment of any High Court holding to the contrary will no longer be good law."

30. Supreme Court in the aforesaid order allowed interest at the rate of 12% per annum.

31. Then we come on the question of interest on refund. In this regard, we find that a Division Bench of Delhi High Court in Surinder Singh v. Union of India 2006 (204) E.L.T. 534 (Del.) relying on Supreme Court judgment in Prince Khadi Woollen Handloom Producers Cooperative Society v. CCE 1996 (88) E.L.T. 637 (SC), said that State, if has wrongly collected a tax from a person, and, even if there is no specific provision, still is liable to refund tax along with interest. Similar view was taken in Kuil Fireworks v. CCE 1997 (95) E.L.T. 3 (SC) and CCE Hyderabad v. ITC 2005 (179) E.L.T. 15 (SC).

32. Recently also in Union of India v. TATA SSL Ltd. 2007 (218) E.L.T. (493), Court held that pre-deposit is refundable along with interest and for that purpose, relied on its decision in Commissioner of Central Excise, Hyderabad v. I.T.C. Ltd. (Supra) and Central Board of Excise and Customs" Circular dated 08.12.2004.

33. In a recent judgment of Gujarat High Court in Hindustan Coca-Cola Beverages Pvt. Ltd. v. UOI 2015 (324) E.L.T. 299 (Guj.), an argument was raised, if there is no provision for payment of interest, the same shall not be

payable. Court in para 5.4 and 6 said as under:-

"5.4 The contention to the effect that no interest is payable because there is no provision of interest under the scheme of the Act is also thoroughly misconceived and misplaced. When the Department acts illegally and not as per the scheme of the Act, the interest on such refund can never be provided for under the Scheme of the Act. If the authorities act as per the law, the question of granting interest on refund can be appreciated and considered as per the scheme of the Act.

6. Learned Senior Advocate for the petitioner cited various judgments in support of his contention that even in absence of any statutory provision, interest on refund is automatic and has to be granted on commercial principles. The Court finds force in the contentions of the learned Senior Advocate for the petitioner. The learned counsel has placed reliance on the decision of the Hon''ble Supreme Court in the case of Sandvik Asia Ltd. v. Commissioner of Income-tax, Pune (supra), wherein the Hon''ble Apex Court even while finding that there was no statutory provision to pay interest on delayed payment of interest, held the assessee entitled to the same on general principles and found that the assessee would be entitled to be compensated by way of interest on interest. It was further pointed out by the learned Senior Advocate for the petitioner that the decision of the Hon''ble Supreme Court in the Sandvik Asia Ltd. v. Commissioner of Income-tax, Pune (supra), has been referred to a Larger Bench in the case of Commissioner of Income-tax, Gujarat v. Gujarat Flouro Chemicals, (2012) ITR 319 (SC). The said decision is neither stayed nor suspended and therefore, continues to hold the field. Moreover, the said decision is doubted with respect to the issue whether interest is payable by the Revenue to the assessee if the aggregate of instalments of Advance tax/TDS paid exceeds the assessed tax. Therefore, a doubt is cast only in respect of the finding which is 12 in context with Section 214 and Section 244 of the Income-tax Act, 1961 and not with regard to grant of interest as compensation to the party who has been wrongfully deprived of the use of its money by an illegal retention of the same by the authority. Therefore, the said decision will continue to hold good in respect of refund cases, on equitable considerations, where any amount is wrongfully withheld from an assessee without authority of law."

34. We may also refer hereon a Division Bench judgment of Karnataka High Court in Commissioner of Central Excise v. KVR Construction 2012 (50) VST 469, wherein construing Section 11B, Court said that it refer to claim for refund of duty of excise only and does not refers to any other amount collected without authority of law. That was a case of "Service Tax" and Court said as under:-

"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 leavey and collect such

service tax. In case, 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 regularize such payment. When once the department had no authority to demand service tax from the respondent because of its circular dated 17.09.2004, 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."

35. The consensus of the authorities of various High Courts as well as 13 Supreme Court is that any amount received by Revenue, as deposit or pre-deposit i.e. unauthorisedly or under mistaken notion etc., cannot be retained by Revenue since it has no authority in law to retain such amount and it must be refunded with interest.

36. In view of above, we allow the writ petition directing the respondents to refund the entire amount refundable to the petitioner as a result of Commissioner's order dated 29.08.2012 with interest at the rate of 12% per annum, which shall be computed from the date, after three months of passing of order by Commissioner, till the amount is actually paid.

37. Petitioner shall also be entitled to cost which is quantified to Rs. 50,000/-.