**(2024) 07 CESTAT CK 1518**

**In the Customs, Excise And Service Tax Appellate, New Delhi**

**Case No :** Service Tax Appeal No. 50941 of 2019

M/s National Engineering Industries Ltd — APPELLANT

Vs

Commissioner, Central Goods & Service Tax Commissionerate — RESPONDENT

**Date of Decision :** 05-07-2024

**Acts Referred:**

Central Excise Act, 1944 — Section 11B
Cenvat Credit Rules, 2004 — Rule 3(1)(b), 3(2), 4
Indian Contract Act, 1872 — Section 72
Constitution of India, 1950 — Article 32, 265

**Citation :** (2024) 07 CESTAT CK 1518

**Hon'ble Judges :** Dr. Rachna Gupta, Member (J);Raju, Member (T)

**Bench :** Division Bench

**Advocate :** A.K. Prasad, Surbhi Sinha, Jaya Kumari

**Final Decision :** Dismissed

# Judgement

Rachna Gupta, J

1. The appellant in the present case is the holder of service tax registration being engaged in providing Business Auxiliary Services. The appellant filed refund claim of Rs. 55,32,646/-initially on 18.06.2008 and subsequently on 14.09.2017 consequent to CESTAT Final Order No. 52873-52874 of 2017 dated 07.04.2017. The said amount was deposited by the appellant as service tax during the period from 05.05.2006 to 20.04.2007. Since the refund claim was filed on 18.06.2008, it was opined to be barred by limitation. Hence vide show cause notice No. 2094 dated 07.11.2017 was proposed to be rejected. The said proposal has been accepted vide order-in-original No. 45/2017-18 dated 12.12.2017. The appeal against the said order has been rejected vide order-in-appeal No. 23/2019 dated 30 June, 2019. Being aggrieved, the appellant is before this Tribunal.

2. We have heard Shri A.K. Prasad, learned counsel for the appellant assisted by Ms. Surbhi Sinha and Ms. Jaya Kumari, learned departmental representative appearing for the revenue.

3. Learned counsel for the appellant has mentioned that initial refund claim dated 18.06.2008 was proposed to be rejected vide show cause notice No. 3185 dated 15.09.2008. The proposal was confirmed vide order-in-original dated 30.06.2009. the claim was rejected both on merits as well as on time bar. Appeal against the said order was rejected vide order-in-appeal dated 07.10.2010. The said order has been set aside by this Tribunal vide final order No. 52873-52874 dated 07.04.2017. The appellants were held entitled for refund claim of Rs. 55,32,646/-by the CESTAT both on merits as well as on limitation grounds. However, the claim was remanded back for being disposed off as per law. Thereafter, the appellants requested the department to sanction the refund claim pending with them since 18.06.2008.

But, instead of honouring the CESTAT Order dated 07.04.2017, a fresh show cause notice dated 07.11.2017 was issued proposing to reject the refund claim on the ground of time bar.

4. The appellant mentioned itself to be the service provider for the recipient i.e. EMD, USA which is located outside India and the services were provided from India by virtue of the agreement dated 01.01.2007 between NEI India and EMD, USA. The services provided amounts to export of service and, therefore, are exempted from service tax in terms of Rule 4 of Export of Service Rules, 2005. This contention of appellant has been accepted by this Tribunal pursuant whereto the initial remand application dated 18.06.2008 was filed by the appellant. The said refund claim was rejected by Assistant Commissioner, Jaipur on the grounds of merit as well as limitation vide order-in-original No. 45/2017-18 dated 12.12.2017. The appeal against the said rejection of refund claim was also rejected vide Commissioner (Appeals) vide order-in-appeal No. 23/2019 dated 30.01.2019. The appeal filed against the said order before this Tribunal was allowed vide Final Order No. 52873-52874 of 2017 dated 07.04.2017 directing the concerned authorities to consider the refund claim of the appellant as per law. The impugned refund claim for the same amount of Rs. 55,32,646/- (as of the previous refund claim dated 18.06.2008) was filed on 14.09.2017 which again has been rejected on the grounds of limitation.

Learned counsel has impressed upon that since the said order is contrary to the directions of Tribunal’s order dated 07.04.2017 the same is liable to be set aside. Learned counsel while relied upon the earlier decision, in their own case, wherein appellant has been held to have been engaged in export of service has prayed for order under challenge to be set aside and appeal to be allowed.

While rebutting the submissions, learned departmental representative has mentioned that the impugned refund claim has been filed under section 11B of the Central Excise Act, 1944. The provision sets out a time limitation of one year. Apparently and admittedly the refund claim was not filed within one year from the date of payment of the said amount. Hence, the same has rightly been rejected on the grounds of limitations. There were no findings in the CESTAT order vis-à-vis the point of limitation. Hence, no error seems to have been committed by the adjudicating authority below. Learned departmental representative has relied upon the decision of Hon'ble apex Court in the case of ITC Ltd. versus Commissioner of Central Excise, Calcutta reported as 2019 (368) E.L.T. 216 (S.C.) wherein it has been held that the claim of refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings. The decision of Hon'ble Delhi High Court in the case of V.T. (India) Pvt. Ltd. versus Union of India dated 06.11.2023 in writ-petition Civil No. 13968 of 2021 is also relied upon. With the submissions, learned departmental representative has prayed for appeal to be dismissed.

5. Having heard the rival contentions, we observe that the refund claim of Rs. 55,32,646/- was for the first time filed on 18.06.2008. This was the amount which was deposited by the appellant during investigation in lieu of the alleged service tax liability for rendering services to EMD, USA which appellant bonafide believing it to be an activity of export of service inviting no tax liability. We also observe that this Tribunal in National Engineering Ltd. i.e. appellant's own case held that the appellant were engaged in export of services which are exempted from the tax liability. The perusal of the said final order would show that the Tribunal while allowing the appeal filed by the appellants with consequential relief recorded following findings in the said final order :-

"In order to avail the benefit of Rule 4, the assessee has to fulfill the conditions of Rule 3 (2) of the said Rules. I agree with the submission of the learned DR that the purpose of Rule 3 (2) of the said Rules is to earn convertible foreign exchange and then benefit of exemption of service tax would be extended to the assessee. In the present case, it is revealed from the purchase order that payment would be made to the appellants by convertible foreign exchange from USA Company through Indian Railways, who paid in Indian Rupees as the same amount of foreign exchange was not released by them. It is well settled that machinery of a statue should be interpreted so as to promote the object and purpose of the scheme. Further, once the legislative intention is properly understood, then the case should be decided in fulfillment with the legislative intention. In the present case, it is revealed from contract that the appellants would be paid USD equivalent to non-convertible Indian Rupee at the rate of exchange prevailing on the date of supply order. It is noted that the equivalent amount of foreign exchange payable to the appellants was not released to the Indian Railways, and therefore, the appellants complied with the provisions of Rule 3 (1) (b) of the Rules.

In view of the above discussion, I find that the denial of benefit of Rule 4 of the said Rules is not justified. So, the impugned order is not sustainable and accordingly, it is set aside. The appeal is allowed with the consequential relief".

6. Based on these findings of this Tribunal that the refund claim of the amount deposited i.e. Rs. 55,32,646/- was filed on 18.06.2008. Department rejected the said claim vide the orders as mentioned above. Thus in the present appeal we

 

are dealing not with the liability of the appellant for paying service tax while rendering Export of Service but are dealing with the issue of refund of amount paid without liability whether permissible or not? We observe this Tribunal vide final order No. 52783-52784 of 2017 dated 07.04.2017 though had allowed the appeal on merits viz-a-viz the liability of the appellant to pay service tax, however, Tribunal directed the concerned authorities to reconsider the refund claim of the appellant as per law. Consequent to the said order that said amount was claimed to be refunded by the subsequent application dated 14.07.2017. Department issued a fresh show cause notice proposing rejection of the refund claim on the grounds of limitation.

7. We observe several decisions have been relied upon by the appellant to show that the activity of the appellant amounts to Export of Service. Principal Bench of this Tribunal in the case of Orbit Research Associates Pvt. Ltd. versus CST vide Final Order No. 50970 of 2023 dated 31.07.2023 has set aside the contention of the department that the services provided by the assessee to foreign clients are classifiable as Business Auxiliary Services. It has been held that such services amount to Export of Service on which they arises no service tax liability. In appellant's own case also similar findings for refund claim of earlier period have been announced as quoted above. It becomes clear that the appellants were not liable to pay any amount of service tax on the commission received from the buyers of services provided by the appellants to those who are located outside India and the said services provided are covered under the Export of Services Rules, 2005. Therefore, the entire amount of service tax of Rs. 55,32,646/- as got collected by the Department was without the authority of law.

8. It is also submitted that where the duty was not payable by the party under the provisions of a statute but had in fact been paid under the mistake of law, the party has a right to recover it and there is a corresponding legal obligation on the part of the Government also to refund the excess duty so collected because the collection in such cases would be without the authority of law, as held by the Hon'ble Supreme Court in the case of Union of India versus ITC Ltd. – 1993 (67) E.L.T. 3 (S.C.). But as already observed above issue of liability towards service tax is different from issue of entitlement for refund of amount deposited with the department. The adjudicating authority was directed to consider refund claim as per law. The relevant provision of law is section 11B of Central Excise Act wherein time limit for filing the refund claim has bene prescribed. The initial claim of 2008 was also beyond the time limit of one year as given in section 11B of the Act. The limitation issue was not discussed by CESTAT. Hence we do not find any infirmity when a fresh show cause notice has been issued by the department.

9. We further observe that learned departmental representative has relied upon decision of Hon'ble Supreme Court in the case of ITC Ltd. (supra), however, we hold that present is not the case of service tax liability based on the self-assessed returns, but it is the case of refund of the amount which was collected

 

during investigation hence it is not an amount of duty otherwise also the appellant has already been held eligible to the appellant. Hence, we hold that refund cannot be rejected taking recourse of the said decision.

10. The another decision of Hon’ble Supreme Court in the case of Mafatlal Industries Ltd. versus Union of India reported as 1997 (89) E.L.T. 247 (S.C.) has also been relied upon by learned departmental representative. From the perused of said decision it is observed that nine-Judge verdict of Hon’ble Supreme Court has decided by a majority of 8:1 as to what rights and remedies are available to a citizen against the State in the matter of refund of unlawfully recovered taxes and imposts. On the one hand, with its seal of approval firmly put on the doctrine of "unjust enrichment", the judgment gives a passive bent to the right of an assessee to seek refund of taxes illegally and unauthorisedly collected from him. On the other hand, with its strict and unsparing interpretation of the "ouster" and "limitation" clauses contained in the statutes in question viz. the Central Excises and Salt Act, 1944 and the Customs Act, 1962, it curtails the remedies hitherto available to an assessee for seeking such refund in different courts and jurisdictions. The right to refund and the remedy for refund are, indeed, the two mainstreams of the said decision.

11. On the question of right to refund i.e. the assessee's substantive right to refund of the illegally recovered tax, the judgment finally bids farewell to the time-honoured notion that the right to refund flows automatically as an absolute right from the mandates of Article 265 of the Constitution of India and Section 72 of the Indian Contract Act, 1872 and that it cannot be diluted or affected by any such equitable plea as "unjust enrichment", "passing on of burden" etc. The new judicial thesis instead rests on the principles of "economic and distributive justice" enshrined in the Preamble and the Directive Principles of State Policy . It also attaches significance to the unethical consequences which would flow and the fiscal and financial chaos which would follow if no bar of "unjust enrichment" is applied by the courts before ordering refunds. Article 265 and Section 72 should all be read and understood, says the majority view, in the light of "the philosophy and the core values of (the Indian) Constitution" and in keeping with "equity and good conscience". In the words of Jeevan Reddy, J., the State should refrain from conferring "an unearned and unjustifiable windfall" upon the assessees.

12. On the issue of remedies, all the three substantially concurring opinions in Mafatlal, namely, those of Jeevan Reddy, J., Paripoornan, J. as well as Ahmadi, C.J., divide the situations in which claims for refund may be preferred by an assessee into three categories, viz.:

First, where the statutory provision ("law") under which the tax is levied is itself challenged by the assessee on the ground of being violative of some provision of the Constitution, i.e., an unconstitutional levy. "In this class of cases, the claim for refund arises outside the provisions of the Act, for this is not a situation contemplated by the Act."

 

Second, where the tax is collected by the authorities under a statute by misconstruction or wrong interpretation of the provisions of the Act, Rules or Notifications or by an erroneous determination of the relevant facts, i.e., an illegal levy. "In this class of cases, the claim for refund arises under the provisions of the Act. In other words these are situations contemplated by and provided for by the Act and the Rules."

Third, where an assessee, with or without protest and with or without a few litigative steps being taken by him, has ended up paying a tax which he was not legally obliged to pay and which he is seeking refund of at a later point of time on discovering that he had paid the tax on account of a mistaken impression of the law, i.e., a tax paid under a mistake of law. In regard to this category it is noteworthy that the Supreme Court, on the one hand, refers to the mistake of law as one falling "within the meaning of Section 72" of the Indian Contract Act, 1872 and still, on the other hand, confines it to a mistake of law discovered only upon a decision being pronounced by the Supreme Court in some other assessee's case wherein "the Supreme Court holds, in the case of some other manufacturer that the levy of that kind is not exigible in law"; furthermore, even the Supreme Court decision contemplated is one rendered in a case of "unconstitutional levy" and not of "illegal levy"3 . The noteworthiness is owing to the fact that Section 72 of the Contract Act itself is not limited to such a qualified category of refund claims founded upon the ground of "mistake of law".

13. On the basis of such categorisation, the majority view proceeds to examine, while acknowledging the true intent and import of the ouster and limitation clauses obtaining in the law concerned, as to in what situations and for what periods of limitation different remedies such as:

(1) writ under Article 226 or Article 32 of the Constitution of India;

or

(2) civil suit under the Code of Civil Procedure; or

(3) statutory application under the law concerned

are expected to be available or unavailable to an assessee desirous of seeking refund of an illegally recovered tax.

14. The above discussed decision of Hon’ble Supreme Court are sufficient to clarify that seeking the refund is not a matter of right and the procedure as discussed in the decision has to be followed. In the present case, apparently none of the said procedure has been followed. Though there had been an earlier order of this Tribunal sanctioning the refund, however, the Tribunal remanded back the matter to the adjudicating authority to dispose of the refund application as per law. In compliance thereof, adjudicating authority has invoked section 11B of Central Excise Act. We do not find any infirmity in the same. We hold that the refund claim of appellant is not maintainable in the light of Mafatlal (supra) decision of Hon’ble High Court.

 

15. As a result thereof entire above discussion, the order under challenge is upheld and the appeal is dismissed.

(Order pronounced in open court on 05/07/2024.)