
(2009) 10 MAD CK 0328

In the Madras High Court

Case No : Writ Petition No. 15357 of 2009

Natraj and Venkat Associates

APPELLANT

Vs

Assistant Commissioner, Service Tax

RESPONDENT

Date of Decision : 20-10-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11B(1)

Contract Act, 1872 — Section 72

Limitation Act, 1963 — Section 17(1)

Citation : (2010) 249 ELT 337 : (2010) 17 STR 3 : (2010) 26 STT 232

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : Pushya Sitaraman, for the Appellant; Vikram Ramakrishnan, for the Respondent

Final Decision : Allowed

Judgement

V. Ramasubramanian, J.—The petitioner has come up with the present writ petition, seeking a Mandamus, directing the respondent to refund the service tax paid by them under a mistake of law, on export of services.

2. I have heard Ms. Pushya Sitaraman, learned Counsel appearing for the petitioner and Mr. Vikram Ramakrishnan, learned Counsel appearing for the respondent.

3. The petitioner is a firm rendering architectural services and holding a registration certificate No. Arch/Chennai-II/40/STC. The petitioner received payment from a client in Sri Lanka on 27.5.2005 in US Dollars and the petitioner paid a sum of Rs. 8,67,800/- on 4.7.2005 towards service tax. But after realising that the services rendered for the construction of a building in Sri Lanka, would not attract service tax, the petitioner made a claim for refund on 20.9.2006.

4. The respondent issued a show cause notice dated 5.10.2006 and after receiving a reply from the petitioner, the respondent issued an Order-in-Original

dated 23.5.2007, rejecting the claim as time barred and also on the ground that the claim was not in the proper format. The petitioner filed an appeal to the Commissioner of Central Excise (Appeals), but the same was also rejected by an order dated 21.11.2008 on the ground that even if the tax was collected without the authority of law, a claim for refund cannot be entertained beyond the period specified in Section 11B of the Central Excise Act, 1944. Therefore, the petitioner is before this Court.

5. Two questions arise for consideration in this writ petition viz., (i) as to whether the claim was liable for rejection on the ground of limitation and (ii) as to whether the petitioner had collected service tax from the customer, so as to become disentitled to claim refund.

6. On the first question, there is no dispute that Section 11B of the Central Excise Act, 1944, prescribes a period of limitation for filing a claim for refund. But the period of limitation would start running only from "the relevant date". The phrase "relevant date" is defined in Clause (B) of the Explanation to Section 11B. The definition is not rigid or fixed, but varies from situation to situation. While sub Clauses (a) to (e) of Explanation (B) deal with the definition of the phrase "relevant date", in relation to the goods exported, goods returned, the goods manufactured or the goods purchased, sub Clause (f) states that the phrase "relevant date" would mean the date of payment of duty, in any other case. In other words, if a case is not covered by sub Clauses (a) to (e), the relevant date for the commencement of the period of limitation, for the purpose of Section 11B, would be the date of payment of duty.

7. Unfortunately, the date of payment, in this case, was admittedly 4.7.2005. The date on which a claim for refund was made, was 20.9.2006, which was obviously beyond the period of limitation. Therefore, at the outset, the rejection of the claim appears to be in tune with the statutory provisions.

8. However, Ms. Pushya Sitaraman, learned Counsel for the petitioner relied upon the decision of the Supreme Court in Union of India and others Vs. I.T.C. Limited, and the decision of a Division Bench of this Court in Collr. Of Cus. Vs. Indo-Swiss Synthetic Gem Mfg. Co. Ltd., and contended that when a payment not required by law was made, this Court has power to order refund.

9. Per contra, Mr. Vikram Ramakrishnan, learned Standing Counsel for the respondent relied upon the decision of the Supreme Court in Union of India v. Kirloskar Pneumatic Company CDJ 1996 SC 525, wherein the Supreme Court set aside an order of the Bombay High Court, which directed the Assistant Commissioner of Excise, not to reject a claim for refund on the ground of limitation.

10. I have carefully considered the rival submissions. Sub-section (1) of Section 11B deals only with a claim for refund of "any duty of excise". But unfortunately, the word "duty" is not defined under the Act. In Chhotabhai Jethabhai Patel and Co. v. Union of India AIR 1962 SC 1006, a Constitution Bench of the Supreme

Court pointed out with reference to Entry 84 of List I of Schedule VII of the Constitution that "a duty of excise is a tax-levy on home produced goods of a specified class or description, the duty being calculated according to the quantity or value of the goods and which is levied because of the mere fact of the goods having been produced or manufactured and unrelated to and not dependent on any commercial transaction in them". The Supreme Court also pointed out that "the primary and fundamental meaning of excise duty in English is that of a tax on articles produced or manufactured in the taxing country and intended for home consumption".

11. In *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, a question arose as to whether the payment of cess made under a mistake of law, can be recovered beyond the period stipulated. Though the Supreme Court ultimately rejected the claim for refund on the ground of delay and laches, the Court made certain observations in paragraphs-7 and 8 of the judgment which read as follows:

7. Section 17(1)(c) of the Limitation Act, 1963, provides that in the case of a suit for relief on the ground of mistake, the period of limitation does not begin to run until the plaintiff has discovered the mistake or could, with reasonable diligence, have discovered it. In a case where payment is made under a mistake of law as contrasted with a mistake of fact, generally the mistake becomes known to the party only when a Court makes a declaration as to the invalidity of the law. Though a party could, with reasonable diligence, discover a mistake of fact even before a Court makes a pronouncement, it is seldom that a person can, even with reasonable diligence, discover a mistake of law before a judgment adjudging the validity of the law.

8. Therefore, where a suit will lie to recover moneys paid under a mistake of law, a writ petition for refund of tax within the period of limitation prescribed i.e., within three years of the knowledge of the mistake, would also lie. For filing a writ petition to recover the money paid under a mistake of law, this Court has said that the starting point of limitation is from the date on which the judgment declaring as void the particular law under which the tax was paid was rendered, as that would normally be the date on which the mistake becomes known to the party. If any writ petition is filed beyond three years after that date, it will almost always be proper for the Court to consider that it is unreasonable to entertain that petition, though, even in cases where it is filed within three years, the Court has a discretion, having regard to the facts and circumstances of each case, not to entertain the application.

12. Though the above views were expressed in the context of a claim for refund arising out of a levy being declared unconstitutional, the views were based upon the theory of unjust enrichment and the principles incorporated in Section 72 of the Contract Act.

13. In *Union of India and others Vs. I.T.C. Limited*, the Supreme Court upheld

the view taken by the Division Bench of the Delhi High Court with regard to the question of limitation. On the question of limitation, the Division Bench of the Delhi High Court had observed that "the duty of excise is that which is levied in accordance with law" and that "any money which is realised in excess of what is permissible in law would be a realisation made outside the provisions of the Act".

14. Therefore, it is clear that if what was paid cannot be taken to be duty of excise, the bar of limitation u/s 11B (1) cannot be applied. This is on account of the fact that the bar of limitation prescribed u/s 11B (1) applies only to "any person claiming refund of any duty of excise and interest". Therefore, I am of the considered view that the claim of the petitioner for refund can be entertained by this Court, since there is no dispute about the fact that no service tax was payable by the petitioner and as a corollary, what was paid by them was not service tax.

15. Coming to the second question, the petitioner has produced proof to show that no service tax was collected by them from their customers. In the affidavit filed by the petitioner, the petitioner has stated that they actually received less than the invoice value and they did not collect any service tax from their customers. Along with the affidavit, the petitioner has also filed the e-mail correspondence and the certificates of foreign inward remittance dated 12.4.2005, 26.5.2005 and 11.1.2007, to show the actual payment received. These documents clearly show that the petitioner is not attempting to make an unjust enrichment for themselves, by seeking refund of service tax which they had already collected from their customers. Therefore, even on merits, the petitioner is entitled to seek refund.

16. In view of the above, the petitioner is entitled to succeed. Hence the writ petition is allowed and the respondent is directed to make a refund of the amount payable to the petitioner, within 8 weeks from the date of receipt of a copy of this order. There will be no order as to costs.