(2000) 02 AHC CK 0157

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Pettion No. 99 of 2000

Prism Cement Limited APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 07-02-2000

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B
Customs Act, 1962 — Section 27

Citation : (2003) 161 ELT 93 : (2006) 2 STR 291 : (2007) 6 STT 107

Hon'ble Judges : S. Rafat Alam, J;M.C. Agrawal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.C. Agrawal, J.—By this petition under Article 226 of the Constitution of India, the petitioner prays for the following reliefs :

(i) issue a writ of certiorari quashing the show cause notices, dated 15-12-1999.

(ii) issue a writ of mandamus directing the respondents to grant refunds of Rs. 10,40,938/- and Rs. 9,38,771/- forthwith along with interest upto date at the rate of 18% per annum.

2. The peritioner''s case is that by the Finance Act, 1994 a tax known as service tax was leviable and by the Service Tax (Eighth Amendment) Rules, 1997 an obligation was placed on the petitioner to collect and deposit the Service Tax from 1-12-1997 to 30-9-1998 from Goods Transport Operators and from 1-7-1998 to 31-7-1999 from Clearing & Forwarding Agents. In pursuance of this, the petitioner deposited Rs. 10,40,938.00 and Rs. 19,38,771-00 along with interest. The petitioner''s case is that it did not collect the tax from the transporters and Clearing & Forwarding Agents and paid the amount out of its own funds. The relevant rules that placed the burden of collecting and depositing tax on the person availing the services of Clearing and Forwarding Agents and the Transport Operators were declared ultra vires by the Hon''ble Supreme Court

in Laghu Udyog Bharati v. Union of India 1999 (112) E.I.T. 365 and the amounts deposited by the petitioners before the Supreme Court who were customers or clients of the Clearing and Forwarding Agents or of the Goods Transport Operators were ordered to be refunded within 12 weeks on their making a demand for refund. In pursuance of the aforesaid Judgment of the Hon''ble Supreme Court, the petitioner has preferred claims for refund of the aforesaid amounts. The Assistant Commissioner Central Excise Division II, Allahabad has issued show cause notice to petitioner in pursuance of the aforesaid claims requiring it to show whether the burden of the levy has been passed on to the customers or to any other person. It has also been noted in the said notice, as under:

"Therefore, when the Supreme Court has struck down certain provisions of statute as unconstitutional and ultra vires, refund cannot be governed by the provisions of Central Excise Act, 1944 in terms of Mafat Lal Industries decision. Each assessee would be required to file a separate Writ Petition and get necessary orders from the Court. In view of what has been laid down in the Mafat Lal Industries case and that all such refund claims cannot be dealt with u/s 11B of the Central Excise Act, 1944."

3. A counter affidavit has been filed in which the aforesaid assertion that was made in the show cause notice has not been repealed. We have gone through the judgment of the Hon''ble Supreme Court in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, and we find that the judgment cannot be read to mean that the appropriate authority under the Central Excise Act or the Customs Act cannot grant a refund, even though the payment was made by mistake or the amount was recovered illegally except when in a suit Court issues decree or in a writ petition filed by the claimant of the High Court issues an appropriate writ in the matter. The proposition laid down by the Hon''ble Supreme Court seems to be that if the appropriate authority does not grant the refund the remedy of the person concerned is to file a suit or writ. The Hon''ble Supreme Court could not have intended that the department concerned should withhold the amount which a claimant is entitled to receive, and drive the claimant to litigation.

4. As regards the question whether the petitioner has himself borne the burden of the amounts paid or has passed on the burden to the Forwarding and Clearing Agents or to the Transporters or to the Customers, these are the questions of fact which the authorities concerned have to examine before deciding whether the amounts should be refunded or not. Therefore, at this stage, the writ petition cannot be entertained.

5. In view of the aforesaid observations, the writ petition is dismissed. It is, however, desired that the petitioner''s claim be examined and disposed of expeditiously.

