(2009) 12 KL CK 0017

In the High Court Of Kerala

Case No : Writ Petition (C) No. 33061 of 2009 (C)

Sudha Ramachandran APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 01-12-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B
Finance Act, 1994 — Section 83

Citation : (2011) 24 STR 175

Hon'ble Judges : C.K. Abdul Rehim, J

Bench : Single Bench

Advocate : E.K. Nandakumar, for the Appellant; Thomas Mathew Nellimoottil, SC, CB EX, for the Respondent

Final Decision : Allowed

Judgement

C.K. Abdul Rehim, J.—Challenge in this writ petition is against Exts. P3 & P5 orders through which the 3rd respondent had rejected claim of the petitioner for refund of service tax paid. The petitioner got herself registered as a service provider with respect to rental income derived by her by letting out of commercial buildings. By virtue of decision of the High Court of Delhi, in Home Solution Retail India Ltd. Vs. Union of India (UOI) and Others, , it is held that levy of service tax on renting out of immovable properties is ultra vires of Finance Act, 1994 as amended, and is therefore illegal.

2. In view of the above decision the petitioner claimed refund of service tax already paid. The claim for refund was made u/s 11B of the Central Excise Act, 1944, which has been made applicable to service tax matters by virtue of Section 83 of the Finance Act, 1994 as amended. The refund application was returned as per Ext. P3 letter observing that the decision of the Delhi High Court, cited above, is under challenge in appeal filed by the Department, before the Hon''ble Supreme Court. Through Ext.P4 the petitioner pointed out that when an application for refund u/s 11B is preferred, the authority concerned is bound to

adjudicate and pass speaking order on such claim for refund. It is pointed out that there is no provision for return of refund application. Ext.P4 notice was further replied by the 3rd respondent, through Ext. P5, pointing out that the Hon''ble Supreme Court has already admitted the appeal filed against the decision of Delhi High Court and since the issue involved is a subject matter pending consideration before the Hon''ble Supreme Court, the 3rd respondent is not in a position to adjudicate upon eligibility of the petitioner. Hence the refund application was returned once again.

3. Learned counsel for the petitioner points out that Section 11B of the Central Excise Act stipulates time limit of a period of one year for claiming refund of any duty paid. Therefore, if the refund application submitted by the petitioner was not entertained by the authority concerned, the same may cause prejudice to the petitioner, because the petitioner will be precluded from claiming refund raising the question of limitation. Learned standing counsel appearing on behalf of respondent on the other hand pointed out that the question regarding liability for payment of service tax has not yet attained finality and the issue is now pending before the Hon''ble Supreme Court. Therefore petitioner''s claim cannot be considered at this point of time, is the contention. It is also pointed out that the petitioner has not produce documents in support of the claim along with the refund application and therefore the refund could not be allowed as such.

4. Having considered rival submissions, I am of the opinion that the return of refund application cannot be treated in any manner as a disposal of the said application under law. It is pointed out by the petitioner that there is no enabling provision so as to return any such claim. The authority concerned has got a duty to consider the application and to pass orders thereon. If the respondent is of the opinion that the question regarding liability of the petitioner for payment of tax is yet to be decided, it is for the authority to reject such claim on that basis. Or on the other hand the authority can also keep adjudication and disposal of the claim for refund pending, till final decision is arrived on the matter, for adopting such a course, the apprehension expressed by the respondent is regarding liability for payment of interest. It is noticed that as per Section 11(B)(B) interest is payable only on amounts which is ordered to be refunded, within a period of three months from the date of application onwards. Therefore the question of payment of refund will arise only if the application is allowed and an order is passed. In view of the above provision the apprehension expressed by the respondent in keeping the refund application pending, does not survive.

5. Under the above circumstances Exts. P3 & P5 are hereby quashed. The 3rd respondent is directed to take back Ext. P2 application and to dispose of the same on merits.

The writ petition is disposed of with the above observations.

