IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	24.02.2021
Pronounced On	31.03.2021

CORAM

THE HON'BLE **MR.JUSTICE C.SARAVANAN**

W.P.No.27919 of 2010

(Through Video Conferencing)

M/s.M.G.M.International Exports Ltd.,
Rep. by its Authorised Signatory,
No.1/9th Street,
Dr.Radhakrishnan Salai,
Mylapore, Chennai – 600 004. ... Petitioner

Vs.

The Assistant Commissioner of
Service Tax, Chennai,
Ist Division, 26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai – 600 034. ... Respondent

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus directing the respondent to make the refund amount of Rs.1,10,999/- to the petitioner with minimum interest.

For Petitioner : M/s.Lakshmi Sriram

For Respondent : Mr.A.P.Srinivas,
Senior Standing Counsel

O R D E R

This Writ Petition has been filed for a writ of mandamus to direct the respondent to refund the tax amount of Rs.1,10,999/- with minimum interest borne by the petitioner under mistake of law. The petitioner was a recipient of service from M/s.IMC Limited. The said company had charged service tax on the petitioner for utilizing the storage facility. The Central Board of Excise and Customs however later by a clarification dated 24.04.2002 clarified as follows:

> 11.However, in the cases under consideration, the agencies are providing only storage facility for liquid cargo which has been imported or is intended for export. They charge rent for storage of liquid cargo deposited with them. They are not connected with the vessel bringing the goods and are not concerned with customs formalities. They issue invoices to customers towards storage charges and for no other charges. These agencies are not receiving any commission from the principal but only rental for storage facility, whereas a C & F agent's remunerations is in the form of commission. The transactions between the parties are not transactions between principal and an agent but between princpal and principal. These agencies are neither receiving any despatch orders from the owners of the goods, nor are they arranging for the despatch of goods as per their directions by engaging transport, as is done normally by C & F agents. They are also not carrying out any service directly or indirectly in connection with clearing and forwarding operations.

> Therefore, services rendered by such agencies, in relation to storage of cargo, cannot be considered to be in the nature of clearing and forwarding and such agencies cannot be considered as "clearing and forwarding agents".
>
> 12.However, under the Finance Bill, 2002, "storage and warehousing services for goods including liquids and gases" is proposed to be made to liable to service tax. Section 65(87) of the proposed amended Finance Act, 1994, defines "storage and warehousing" to include storage and warehousing services for goods including liquids and gases but does not inlcude any service provided for storage of agricultural produce or any services provided by cold storage. Therefore, as and when these provisions of the Finance Bill come into effect the above types of cases shall be liable to service tax under the head "storage and warehosuing".

2. Under these circumstances, M/s.IMC Limited filed a refund claim before the jurisdictional Assistant Commissioner of Service Tax on 23.07.2002. Later, the petitioner on coming to know of the above development has filed a refund claim on 27.06.2005. The refund claim was filed by the petitioner on the service tax borne by the petitioner for the period between September 1999 to March 2000.

3. During the said period, storage services offered by M/s.IMC limited to the petitioner was not liable to service tax as per the above

clarification dated 24.04.2002 of the Central Board of Excise & Customs, New Delhi referred to *supra*. The refund claim of the petitioner was rejected by the Original Authority namely the respondent herein by an Order-in-Orginal No.85/07 dated 02.03.2007 on the ground that the claim was time barred under Section 11B of the Central Excise Act, 1944 as made applicable to refund of service tax under Section 83 of the Finance Act, 1994.

4. Aggrieved by the same, the petitioner preferred an appeal before the Commissioner of Central Excise (Appeals) vide Appeal No.28/2007 (M-ST). The said appeal was disposed by the Commissioner of Central Excise (Appeals) vide Order-In-Appeal No.57/08(M-ST) dated 29.09.2008. The Commissioner of Central Excise (Appeals) upheld the order dated 02.03.2007 of the Original Authority and rejected the appeal filed by the respondent. The petitioner therefore preferred an appeal before the Customs Excise and Service Tax Appeallate Tribunal aginst the aforesaid Order-In-Appeal No. 57/08(M-ST) dated 29.09.2008 vide Appeal No.ST/162/2009/MAS. The said appeal also was rejected by the said Appellate Tribunal on 16.02.2010.

5. Under these circumstances, the petitioner has filed this Writ Petition for a writ of mandamus to direct the respondent for refund of the amount borne by the petitioner as service tax as a receipient of service of M/s.IMC Limited. The learned counsel for the petitioner further submitted that the petitioner is not aware as to the status of the refund claim filed by M/s.IMC Limited. She however submits that the petitioner has come to know the writ petition was pending before this Court at the behest of M/s.IMC Limited.

6. The learned counsel for the petitioner submits that though the order dated 20.10.2009 passed in **Assistant Commissioner of Service Tax Chennai** Vs. **M/s.Nataraj and Venkat Associates** has been reversed by an order dated 23.04.2013 in W.A.No.129 of 2010 of the Division Bench of this Court, nevertheless, the petitioner is entitled for a mandamus.

7. The learned counsel for the petitioner has filed a copy of the order of the Punjab and Haryana High Court at Chandigarh passed in **M/s.Sarita Handa Exports (P) Ltd** Vs. **Union of India and others**, in

C.W.P.No.17220 of 2010 which has been affirmed by the Hon'ble Supreme Court. She further submitted that the decisions of the other High Courts granting refund under similar circumstances refund claims have been allowed.

8. Opposing the prayer for grant of refund, the learned counsel for the respondent submits that the writ petition was liable to be dismissed or in the alternative the petitioner should be relegated to pursue the remedy before the Hon'ble Division Bench by way of C.MA under Section 35(a) of the Central Excise Act, 1944 as made applicable to Appeals against orders of the Tribunal under Section 83 of the Finance Act, 1994.

9. He further submits that the Division Bench of this Court in **Metal Weld Electrodes** Vs. **CESTAT, Chennai** [2013 Writ.L.R 1041; (2014) 299 E.L.T 3 (Mad)] has held that no Writ Petition is maintainable alone against an order of the Tribunal. He further submits that even under orders passed under Section 35F of the Central Excise Act, only a CMA before a Division Bench by way of an statutory appeal is maintainable and therefore this writ petition is liable to be dismissed.

10. I have considered the arguments advanced by the learned counsel for the petitioner and the respondent. I have also perused the impugned order and the case laws.

11. The Hon'ble Supreme Court in **UOI** Vs. **Mafatlal India Ltd.**, 1997 (89) ELT 247, while dealing with refund of tax, classified refunds into two categories. The first one on account of unconstitutional levy and second one on account of illegal levy.

12. Former was on account of the provision under which the collection was made is declared as unconstitutional subsequently and the latter on account tax collected by the authorities under the Act by mis-construction or wrong interpretation of the provisions of the Act, Rules and Notifications or by an erroneous determination of the relevant facts, i.e., an erroneous finding of fact. In the latter class of cases, the claim for refund it has been held to arise under the provisions of the Act and governed by the situations contemplated by, and provided for by, the Act and the Rules.

13. Explaining the second category of refund, the Court also held that where a duty of tax has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law. So long as that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained.

14. It was held that it was un-understandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis. In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. It observed that if this theory is applied universally, it will lead to unimaginable chaos.

15. Therefore, the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee. (See the pertinent observations of Hidayatullah, CJ. in Tilokchand Motichand extracted in Para 37). The decisions of the Court saying to the contrary was held to have been decided wrongly and were accordingly overruled herewith. [AIR 1959 SC 135 and 1968 (3) SCR 662 overruled; 1969 (2) SCR 824 followed]. [paras 70, 99]

16. It has also held that the very collection and/or retention of tax without the authority of law entitles the person, from whom it is collected, to claim its refund. It also observed that a corresponding obligation is cast

upon the State to refund it can also be said to flow from it. This can be called the right to refund arising under and by virtue of the Constitutional provisions, viz., Article 265 of the Constitution of India.

17. At the same time, it held that it does not follow from this that refund follows automatically. Article 265 of Constitution of India cannot be read in isolation. It must be read in the light of the concepts of economic and social justice envisaged in the preamble and the guiding principles of State Policy adumbrated in Articles 38 and 39 of the Constitution, an aspect dealt with at some length at a later stage. The very concept of economic justice means and demands that unless the claimant (for refund) establishes that he has not passed on the burden of the duty/tax to others, he has no just claim for refund. It observed that it would be a parody of economic justice to refund the duty to a claimant who has already collected the said amount from his buyers. The refund should really be made to the persons who have actually borne its burden that would be economic justice. Section 72 of the Contract Act may be attracted to such a case and a claim for refund of tax on this score can be maintained with reference to Section 72. This Section contains a rule of

equity and once it is a rule of equity, it necessarily follows that equitable considerations are relevant in applying the said rule. Thus, whether the right to refund of taxes paid under an unconstitutional provision of law is treated as a constitutional right flowing from Article 265 or as a statutory right/equitable right affirmed by Section 72 of the Contract Act, the result is the same nad there is no automatic or unconditional right to refund. [paras 20, 69]

18. Pursuant to the directions given in **Mafatlal Industries** Vs. **Union of India**, 1997 (89) E.L.T. 247 (S.C.), the Hon'ble Supreme Court has laid down the following guidelines in **Assistant Collr. Of Cus.** Vs. **Anam Electrical Manufacturing Co.**, 1997 (90) E.L.T. 260 (S.C.):-

> (1) Where a refund application was filed by the manufacturer/purchaser beyond the period prescribed by the Central Excise Act/Customs Act in that behalf, such petition must be held to be untenable in law. Even if in any appeal, suit or writ petition, direction has been given that the refund application shall be considered with reference to the period of limitation prescribed in the Central Excise Act/Customs Act - or that the period of limitation shall be taken as three years - such a direction of the Appellant Court/Civil Court/High Court shall be deemed to be unsustainable in law and such direction

shall be set aside. The period prescribed by the Central Excise Act/Customs Act for filing a refund application in the case of "illegal levy" cannot be extended by any Authority or Court.

(2) Where, however, a refund application was filed within the period prescribed by the Central Excise Act/Customs Act but has been dismissed wholly or partly on any ground and the said order is questioned by way of a writ petition or a suit or any appeal arising therefrom the manufacturer/purchaser shall be entitled to withdraw the writ petition, suit or an appeal arising therefrom, as the case may be, and file an appeal before the appropriate appellate authority within sixty days from today. It is clarified herewith that even in a case where such writ petition has been allowed and an appeal filed by the Revenue is pending, the writ petitioner shall be entitled to withdraw the writ petition, in which event, the Revenue appeal shall be disposed of permitting the writ petitioner to withdraw the writ petition to pursue the remedy proposed hereby. If such an appeal is filed, it shall be entertained without raising an objection on the ground of limitation and shall be dealt with in accordance with law. This direction shall apply even in cases where the High Court or Civil Court is approached after exhausting the remedy of appeal to Collector (Appeals). He can file an Appeal to C.E.G.A.T. within sixty days from today, after withdrawing the writ petition or the suit, as the case may be.

(3) Where, however, a writ petition or suit claiming refund was filed directly in the High Court/Civil Court (i.e., without filing a refund application), the petitioner/plaintiff shall be entitled to withdraw such writ petition/suit or any appeal arising therefrom and prefer a refund claim under Section 11B within sixty

days from today *provided* the writ petition or suit was filed within the period prescribed by the Central Excise Act/Customs Act for filing the refund application. It is clarified herewith that even in a case where such writ petition has been allowed and an appeal filed by the Revenue is pending, the writ petitioner shall be entitled to withdraw the writ petition, in which event, the Revenue appeal shall be disposed of permitting the writ petitioner to withdraw the writ petition to pursue the remedy proposed hereby.

(4) The above rules, however, do not apply in the case of a claim for refund of duty levied and recovered under an unconstitutional provision. In such a case, the period of limitation shall be prescribed in *Mafatlal Industries.* The duty to allege and prove that the duty has not been passed on to another person, of course, remains even in such a case.

(5) Where a person challenges the constitutionality of a provision in the Central Excise Act/Customs Act in a High Court or the Supreme Court but fails in his challenge to constitutionality, he cannot take advantage of the decision in the case of another person striking down the said provision, as explained in the judgment. This rule is evolved in the particular context of refund claims under these two enactments and has to be observed.

(6) Where a refund application or an appeal is preferred under and in accordance with the directions (1), (2), (3) and (4) above, the same shall be entertained only if the applicant for refund/appellant files affidavit stating that he has not passed on the burden of the duty, which is claimed by way of refund, to another person. In case the applicant for

refund is a company or a society, the affidavit shall be sworn by the Managing Director of the Principal Officer of the Company or the Society, as the case may be. Such an affidavit shall be treated as an averment/assertion which an applicant for refund has to make in terms of the judgment in *Mafatlal.*

7(a) Where the refund claim is rejected by this Court, the assessee who has already obtained any amount by way of refund shall be liable to pay back the same to the Department and the Department shall be entitled to recover the same in accordance with law

(7)(b)If the refund claim is rejected by an authority under the Act and where the assessee has already obtained the refund he shall be liable to pay back the said amount to the Department according to law and the Department shall be entitled to recover back the said amount, subject to orders, if any, by an Appellate Authority.

19. There is no dispute that the amount was collected and paid to the Department by IMC Ltd. contrary to the law as has been clarified by the Central Board of Excise and Customs by its clarification bearing reference Order No.2/1/2002 - ST dated 24.04.2002 when it has been clarified that storage and warehousing services for goods including liquids and gases was proposed to be made liable to service tax in Finance Bill, 2002. Therefore, as and when the Circular dated 24.04.2002 containing section 65(87) was passed as a Finance Act, service tax

become payable under “storage and warehousing”.

20. Admittedly, collection of service tax by IMC Ltd. during the material period in dispute was contrary to law as was clarified by the Central Board of Excise and Customs vide its Circular dated 24.04.2002. Thus, the collection of the amount was contrary to Article 265 of Constitution of India and therefore, the amount collected ought to have been refunded back, if a refund claim was filed in time from the date of payment under Section 11B of the Central Excise Act, 1944.

21. Thus, collection of tax by IMC Ltd. was not only contrary to the provisions of the Finance Act, 1994 but also the appropriation of such amount by the service tax department contrary to Article 265 of the Constitution of India. However, payment of tax by IMC Ltd. and appropriation and collection by service tax department at best was on account of mis-construction of the provisions of theFinance Act, 1994 as it stood and therefore, any refund of such tax paid on borne by any person would be governed by the provisions of the Central Excise act, 1944 as made applicable to refund under Finance Act, 1994 by virtue of

Section 83 of the Finance Act, 1994.

22. Therefore, refund of tax if any borne by the petitioner had to be made only within a period of limitation prescribed under Section 11B of the Central Excise Act, 1944 notwithstanding the fact that the petitioner became aware of the wrong payment of tax only after the Central Board of Excise and Customs issued clarification bearing reference Order No. 2/1/2002-ST dated 24.4.2002. Thus, the period prescribed under section 11B of the Central Excise Act, 1944 had expired long before the above were clarification was issued.

23. The Hon'ble Supreme Court in **Commissioner** Vs. **Allied Photographics India (P) Ltd**., 2004 (166) E.L.T. 3 (S.C.) considered the case of distributor who had borne the incidence of tax and posed the following question:-

> " The point which still remains to be decided is whether the respondent herein was entitled to refund without complying with Section 11B of the Act on the ground that it had stepped into the shoes of NIIL (manufacturer) which had paid the duty under protest?"

24. The Hon'ble Supreme Court in para 15 has answered the issue as follows:-

> **15.** Mr. Ganesh, learned Senior Counsel appearing on behalf of the respondent vehemently urged that the issue arising in the present matter is squarely covered by the decision of Division Bench of this Court in the case of **National Winder v. Commissioner of Central Excise, Allahabad [2003 (154) E.L.T. 350] in which it has been held that if duty is paid by a manufacturer under protest then limitation of six months will not apply to a claim of refund by a purchaser. For the reasons given hereinabove, we hold that the said judgment is *per incuriam*.** At this stage, it is important to note that the Division Bench judgment [Hon'ble S.N. Variava and B.P. Singh, JJ.] in the case of *National Winder* (supra) was delivered on 11-3-2003. However, on 13-11-2003, the Division Bench [Hon'ble S.N. Variava and H.K. Sema, JJ.], has referred the matter as stated above to the Larger Bench in the light of conflict which the Division Bench noticed between the earlier judgments of this Court on one hand and Paragraph 104 of the judgment of the Constitution Bench of nine-Judges in the case of *Mafatlal Industries Ltd.* (supra). Hence, by this judgment, we have clarified the position in law.

25. Though the learned counsel for the petitioner has cited few decisions of the Andhra Pradesh High Court, Punjab and Haryana High Court and that of the Karnataka High Court, I am afraid that these decisions have either not considered the decision of the Supreme Court in

Mafatlal Industries Ltd Vs. **Union of India**, 1997 (89) ELT 247 in its proper perspective or have ignored the same altogether. The decision of the Hon'ble Supreme Court in **Commissioner** Vs. **Allied Photographics India (P) Ltd**., 2004 (166) E.L.T.3 (S.C.) sealed the fate of the refund claim and put the last nail in the coffin and has thereby destroyed all the hopes of the petitioner.

26. Therefore, I unable to persuade myself to grant any relief to the petitioner even though the petitioner has been wrongly made to pay and suffer tax. Therefore, I dismiss this writ petition with liberty to the petitioner to implead itself in the Writ petition if any that may have been filed by IMC Ltd.

27. In case the Court there independently finds that the refund filed by IMC Ltd was in time, the issue may be considered independently as to whether the petitioner was entitled for refund.

28. This Writ Petition stands dismissed with the observation. No

cost.

31.03.2021

Index : Yes/No
Internet : Yes/No
jen / jas

To
The Assistant Commissioner of Service Tax,
Ist Division, 26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai – 600 034.

C.SARAVANAN, J.

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Pre- delivery order in
W.P.No.27919 of 2010

31.03.2021