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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP-19918-2013(O&M)
Date of Decision: 04.11.2024

M/s Durga Board and Paper Industries Limited
Vs.
..... Petitioner

Union of India and another
..... Respondents

CORAM: HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON'BLE MR. JUSTICE SANJAY VASHISTH

Present: Mr. Deepak Aggarwal, Advocate for the petitioner.

Mr. Saurabh Goel, Sr. Standing Counsel and
Ms. Geetika Sharma, Advocate
for the respondentNo.2/revenue.

SANJEEV PRAKASH SHARMA, J.(Oral)

1. Petitioner states to be engaged in manufacturing of Duplex Board. The present writ petition has been preferred seeking to recover a sum of Rs.3,66,649/- which was paid by the petitioner to the Department as interest in excess of actual interest liability.
2. As per Rule 8 of the Central Excise Rules, 2002, the petitioner deposited additional interest amount on account of delayed payment of excise duty. However, the Rajasthan High Court in case of 'Lucid Colloids Ltd. Vs. Union of India', 2006(200) ELT-370, held that Sub-Rule (3) of Rule 8 is *ultra vires* to Section 11AB(1) of the Central Excise Act, 1944 (for short, 'the Act'), therefore, interest cannot be charged more than 2% per month. Accordingly, the petitioner moved application dated 20.04.2007 before

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the respondents-Department seeking refund of the excess interest amount of Rs.3,66,649/-. The said application was rejected being time barred in terms of Section 11B of the Act vide order dated 10.07.2007. Thereafter, appeal against the order dated 10.07.2007 was allowed on 01.11.2007. The Department preferred further appeal against the said order and the same came to be decided on 21.12.2009 by the Customs Excise and Service Tax Appellate Tribunal (for short, 'the CESTAT') in favour of the department holding the application to be time barred.

3. Keeping in view the observations made by the Rajasthan High Court, the petitioner preferred the present writ petitioner wherein the petitioner has urged that in terms of the observations made by the Supreme Court in '**Mafatlal Industries Ltd. Vs. Union of India**',1997(89) **ELT 247(SC)**, the writ petition would be maintainable and the amount deserves to be returned and refunded to the petitioner as Rule 8(3) of the Central Excise Rules, 2002 has been declared *ultra vires*.
4. The written statement was filed by the respondents, stating that the order passed by the CESTAT dated 21.12.2009 has not been set aside and attained finality and therefore, the respondents are not required to refund the amount.
5. Learned counsel appearing on behalf of respondent No.2/revenue submits that the refund application was moved under Section 11B of the Act. Therefore, the petitioner is bound by the provisions of law for the purpose of refund and after having availed the said remedy, it cannot be allowed to take up the remedy under Article 226 of the Constitution of India specifically for the same relief.



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6. Learned counsel for the revenue further submits that the respondents are not required to refund the amount, which was deposited by the petitioner at the relevant time in terms of their own self assessment. Learned counsel relies upon paragraph No. 99 (ii) of Mafatlal's case (supra). For reference, same is reproduced herebelow:

“99 (ii) Where, however, a refund is claimed on the ground that the provisions of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception: where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it.

Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying

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Clause(c) of sub-section (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, claim of this nature is not contemplated by the said enactments and is outside their purview.”

7. We have considered the submissions, paragraph No.69 of Mafatlal’s case (supra) carves out as under:

“69. There is, however, one exception to the above proposition, i.e., where a provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation of any of the constitutional limitations. This is a situation not contemplated by the Act. The Act does not contemplate any of its provisions being declared unconstitutional and therefore it does not provide for its consequences. Rule 11/Section 11B are premised upon the supposition that the provisions of the Act are good and valid. But where any provision under which duty is levied is found to be unconstitutional, Article 265 steps in. In other words, the person who paid the tax is entitled to claim refund and such a claim cannot be governed by the provisions in Rule 11/Section 11B. The very collection and/or retention of tax without the authority of law



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entitles the person, from whom it is collected, to claim its refund. A corresponding obligation 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. But, it does not follow from this that refund follows automatically. Article 265 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 - 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 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. Conferring an unwarranted and unmerited monetary benefit upon an individual is the very anti-thesis of the concept of economic justice and the principles underlying Articles 38 and 39. Now, the right to refund arising as a result of declaration of unconstitutionality of

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a provision of the enactment can also be looked at as a statutory right of restitution. It can be said in such a case that the tax paid has been paid under a mistake of law which mistake of law was discovered by the manufacturer / as-sessee on the declaration of invalidity of the provision by the court. 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 too, however, does not mean that the taxes paid under an unconstitutional provision of law are automatically refundable under Section 72. Section 72 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 - an aspect which we shall deal with a little later. 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 - there is no automatic or unconditional right to refund”

8. Considering the said observations of Mafatlal’s case (supra) and also reading the same in congruity with paragraph No.99(ii) of Mafatlal’s case (supra), we find that the present case cannot be said to fall in terms of paragraph No.99(ii) of Mafatlal’s case (supra), as the petitioner has not

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challenged the Constitutional validity before any Court. Therefore, the submission of learned counsel for the revenue relying upon the aforesaid paragraph has no basis, therefore his contention is hereby rejected.

9. Learned counsel for the petitioner further points that once a provision of law has been declared *ultra vires* it would mean that the same was never existing on the statute, hence, if any person has acted on the basis of an *ultra vires* Rule or Provision under an Act, such action giving advantage to any of the parties, will have to be recalled. It is *akin* to a situation which may arise and considered in terms of Section 144 C.P.C.

Thus, when a person deposits a penalty more than required in terms of any Rule which is ultimately declared as *ultra vires*, the said amount will have to be returned back to him. It may be at his request or the department may take initiative and return it back.

10. We do not accept the contention of learned counsel for the revenue/department that they are not obliged to return the excess amount. An amount received on the basis of provisions of law, which has been declared *ultra vires* has to be treated as in contravention of provision of Article 265 of the Constitution of India and the same has to be refunded. The Supreme Court in *Mafatlal's case* (supra) has held that a person is entitled to receive the amount once the Court holds a person entitled to it and as a corollary the Department would not be entitled to keep the same with them. Therefore, we hold that even if an application is not moved, the department would be obliged to refund the amount to concerned person from whom the excess amount has been received unlawfully after the provision has been declared *ultra vires*..



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11. Accordingly, this Court holds that the amount kept by the respondents as excess amount of Rs.3,66,649/- was unjustified and the Department ought to have refunded it back. The application for refund moved by the petitioner has wrongly been treated as an application under Section 1B of the Act and should have been treated as a simple application for refund in terms of the provisions having been declared *ultra vires*, if the amount therefore has to be returned to the petitioner.
12. Keeping in view that the Supreme Court recognizes an obligation of the State to refund in Mafatlal’s case (supra), the present writ petition is allowed and we hereby direct the respondents to now refund the amount alongwith interest @ 6% per annum from the date the same was deposited erroneously.
- 13.All pending applications also stand disposed of accordingly.

(SANJEEV PRAKASH SHARMA)
JUDGE

(SANJAY VASHISTH)
JUDGE

November 04, 2024

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| 1. Whether speaking/reasoned? | Yes/No |
| 2. Whether reportable? | Yes/No |