(1990) 06 GAU CK 0013

Gauhati High Court

Case No: Civil Rule No. 625 of 1985

Assam Industrial Corporation		APPELLANT
	Vs	
Union of India and Ors.		RESPONDENT

Date of Decision: June 29, 1990

Acts Referred:

- Central Excise Rules, 1944 - Rule 11, 11
- Contract Act, 1872 - Section 72, 72
- Limitation Act, 1963 - Article 113, 113, 23, 23

Citation: (1990) 2 GLJ 86 : (1991) 1 GLR 126

Hon'ble Judges: J.M.Srivastava, J and B.P.Saraf, J

Bench: Division Bench

Advocate: S.S.Sharma, Sk.Chand Mohammad, B.K.Jain, Advocates appearing for Parties

Judgement

Dr. B. P. Saraf, J.

This writ petition arises out of an order dated 30.9.80 passed by the Appellate Collector of Customs and Central Excise, Calcutta dismissing the appeal filed by the petitioner claiming refund of a sum of Rs. 50.000/ deposited under mistake of law.

The facts of the case are brief and undisputed. The petitioner is a partnership concern carrying on the business of manufacture of aluminum conductors, barbed wire, wire nails, wire netting etc. It has its factory at Industrial Estate, Gauhati. As some of the items manufactured by the petitioner are subject to duty under the Central Excise and Salt Act, 1944 (hereinafter ''the Act'') the petitioner is licensed under the said Act and had been paying excise; duty on such items in accordance with law from time to time. Under the Act and the Rules framed thereunder every manufacturer is required to remove the goods from the factory only on payment of central excise duty. The petitioner had been strictly complying with the said requirement. During the period from 1. 4.1979 to 1.8. 1979 the petitioner removed certain goods manufactured by it on payment of excise duty at the prescribed rate

which amounted to Rs. 50,000/. At that point of time the petitioner was not aware that by virtue of Notification No. 71/78 CE dated 1.3. 1978 issued by the Government of India under Rule 8 (I) of the Central Excise Rules, 1944 (hereinafter ''the Rules''), no excise duty was payable on the clearances made by the petitioner. Neither it was pointed out to the petitioner by the officers of the Department. It is only sometime in the third week of September, 1979 that the petitioner came to know of the said Notification. It may be mentioned here that by Notification under reference the Central Government exempted excisable goods specified therein referred to as "specified goods" in respect of the first clearance for home consumption upto aggregate value not exceeding Rs. 5 lakhs cleared on or after 1st day of April in any financial year by and on behalf of a manufacturer, from one or'' more factories, from the whole of the duty of excise leviable thereon subject to the conditions specified therein. There is no dispute that goods cleared by the petitioner from 1.4.79 to 1.8.79, in respect of which a sum of Rs. 50,000/was deposited on account of excise duty, were exempt from excise duty by virtue of the aforesaid Notification, and that the payment made was, in fact, a payment made under mistake of law. Having come to know of the mistake, the petitioner by letter dated 26.9.79 requested the Assistant Collector, Customs & Central Excise, Gauhati to provide it with a specimen copy of the latest form in which the claim for refund of the duty for the year 1197980, arising out of the aforesaid Notification could be made. The said form was supplied to the petitioner only on 28.2.80. The petitioner, however, could get the form a few days earlier from some other source. Accordingly, he submitted the application for refund to Assistant Collector on 29.2.80. The said application was rejected by the Assistant Collector by his order dated 13.6.80 on the ground that the claim was barred by limitation as it had been filed after expiry of the period of six months prescribed in Rule 11 of the Rules. The petitioner preferred an appeal before the Appellate Collector of Customs & Central Excise, Calcutta. Before the Appellate Collector it was contended, inter alia, that the application for refund should be treated as in time in view of the fact that an application had been filed by the petitioner for supplying a specimen copy of the application form as back as on 26.9.79, but the same could be supplied only on 28.2.80 and in view of this fact the petition should be treated as in time. The Appellate Collector, however, rejected the appeal and held the claim as barred by limitation under Rule 11 of the Rules. A further appeal was preferred before the Additional Secretary (Revision Application), Ministry of Finance, Government of India, which, on account of formation of the Customs, Excise and Gold (Control) Appellate Tribunal in the meantime, was transferred to the said Tribunal. The Tribunal by its order dated 31.10.83 also held the application to be barred by limitation and dismissed the appeal.

Having exhausted all the remedies provided under the Act, the petitioner filed the present writ petition before this Court. The petitioner claims that admittedly the payment made by it being a payment made under mistake of law, it was incumbent on the part of the respondents to refund the amount to the petitioner and not to

take resort to plea of limitation which was not available to them as strictly speaking it was not a case of claim of refund under Rule 11 but a claim for refund of deposit made under mistake of law and as such, the authorities acted erroneously in rejecting the same on the ground of the claim being barred by limitation under the said Rule.

The respondents filed a counter. The stand of the respondents is that the claim is barred by limitation, that the petitioner ought to have been aware of the Notification regarding exemption which was issued as back as on 1.3.78, that the petitioner has to blame itself for the deposit made by it in such a situation, and that despite exemption notification the petitioner kept paying the duty with ulterior motive. It is also contended in the counter that leaving aside the question of limitation even if the refund claim is examined in its proper perspective taking it to be within the period of limitation, the refund claim would not be entertain able in view of the decision of the Bombay High Court in Roplas (India) Limited vs. Union of India, AIR 1989 Bombay 183.

We have heard Mr. S. S. Sharma, learned counsel for the petitioner. Also heard Sk. Chand Mohammad, Senior Central Government Standing Counsel. In this case undisputable a sum of Rs. 50,000/was deposited by the. petitioner for clearance of excisable goods for home consumption which were exempt from excise duty vide Notification dated 1.3. 78. It was deposited under mistake of law. In the premises, it is manifest that the respondents had no authority to retain the money deposited by the petitioner under mistake of law as ''excise duty'' under the Act and, as such, the money was liable to be refunded. The claim for refund was rejected only on the ground that the application for refund had been filed beyond the time limit prescribed under Rule 11 of the Rules.

Three questions fall for consideration in this case. Firstly, whether Rule 11 of the Rules applies to a case where refund is claimed of an amount wrongly deposited by a person with the central excise authorities as excise duty under a mistake of law. If the answer'' to the first question is in negative, the second question that falls for determination is whether claim for such refund shall be governed by section 72 of the Contract Act, 1872. If that is so, the period of limitation of three years from the date when mistake was known, as prescribed under the Limitation Act of 1963 for recovery of such amount, would apply and not the limitation of six months under Rule 11 of the Rules. The third question is whether section 72 of the Contract Act applies to tax or duty etc. paid by mistake of law.

We may first deal with the question regarding applicability of Rule 11. Rule 11 so far as relevant, reads:

"11. Claim for refund of duty.Any person claiming refund of any duty paid by him may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty :

Provided that the limitation of six months shall not apply where any duty has been paid under protest."

From a reading of Rule 11, it is clear that it applies only to refund of duty paid under the Act. When admittedly duty was not payable under the Act on the clearances in question by virtue of the exemption granted by the Central Government, the deposit made by the petitioner cannot be said to be a payment of duty. In that view of the matter Rule 11 shall have no application to the claim for such refund and so also the limitation for making the claim prescribed there under. This aspect of the matter is wellsettled by a recent decision of the Supreme Court in Salonah Tea Co. Ltd. vs. Superintendent of Taxes, Nowgong, (1988) 1 SCC 401 where, dealing with the provision for refund contained in the Assam Taxation (on Goods etc.) Act, it was held that the said provision applied only in a case when money was paid under the said Act. If there was no provision for realisation of the money under the said Act, the act of payment was ultra vires. In that view of the matter the provisions of the said Act relating to refund would not apply. Following the law laid down by the Supreme Court we hold that in the instant case the payment made by the petitioner admittedly not being a payment due under the provisions of the Central Excise Act, Rule 11 of the Rules would not apply to the claim for refund of the said sum. The application for refund, though filed in the form prescribed under Rule 11 was, therefore, in fact an application claiming refund of sum deposited under mistake of law. An application for such refund falls under section 72 of the Contract Act. The period of limitation that applies to such a claim is one prescribed under Article 113 read with section 23 of the Limitation Act of 1963, which is three years from the date when the mistake is known. In the instant case the application was admittedly filed within such period. We may now turn to the next question, whether an assessee who committed a mistake in thinking that monies deposited by him by way of tax or duty were due under the Act when in fact they were not due, on having realised the mistake is entitled to recover the same back from the State under section 72 of the Contract Act. This point appears to have been settled long back by a Five Judges Bench of the Supreme Court in Sales Tax Officer, Banaras vs. Kanhaiya Lai Makund Lal Saraf, AIR 1959 SC 135 wherein it was held :

"……if it is once established that the payment, even though it be of tax, has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the same is bound to repay or return it. No distinction can, therefore, be made in respect of a tax liability and any other liability on a plain reading of the terms of S. 72 of the Indian Contract …To hold that tax paid by mistake of law cannot be recovered under S. 72 will be not to interpret the law but to make a law by adding some such words as ''otherwise than by way of taxes'' after the word ''paid''. (Emphasis supplied)

We may, in this connection, also refer to the observations of the Supreme Court in this regard in Salonah Tea Co. Ltd. ts. Superintendent of Taxes, Nowgong, supra. It

was a ease under the Assam Taxation (on Goods carried by Road or Inland Waterways) Act, 1961. The dispute was regarding refund of tax paid under that Act under mistake of law. Sabyasachi Mukharji, J. (as the Hon''ble Chief Justice then was) observed (at para 6 of the report);

".....Normally speaking in a society governed by the ruleof law taxes should be paid by citizens as soon as they are due in accordance with law. Equally as a corollary of the said statement of law it follows that taxes collected without the authority of law as in this case from a citizen should be refunded because no State has the right to receive or to retain taxes or. monies realised from citizens without the authority of law.'""

It was further observe J at para 17 of the report :

".....it appears to us that this was a tax realised in breach of the section, the refund being of the money realised without the authority of law. The realisation is bad and there is a concomitant duty to refund the realisation as a corollary of the constitutional inhibition that should be respected unless it causes injustice or loss in any specific case or violates any specific provision of law."

We do not propose to multiply authorities. It is abundantly clear from the aforesaid decisions of the Supreme Court that section 72 of the Contract Act applies with the same vigour to the State as it applies to a citizen. No distinction can be drawn in the matter of application of section 72 between payment made in respect of tax liability and any other liability.

In the instant case the undisputed position is that a sum of Rs. 50,000/ was deposited under the mistake of law in respect of clearances which were exempt from excise duty by virtue of the Notification issued by the Central Government. In the premises, in view of the aforesaid decisions of the Supreme Court, the respondents had no authority to retain the said amount and, as such, they were liable to refund the same to the petitioner.

However, before we conclude the case, it is necessary to deal with one more aspect of the case which has been sought to be projected by the respondents in the counter affidavit, that the petitioner is not entitled to get the refund as it might have shifted the incidence thereof to others and in that view of the matter refund will amount to unjust enrichment. We are not impressed by this stance taken by the respondents. We asked the learned counsel for the respondents to inform the Court whether there were any materials to support the allegation that the amount deposited by the petitioners had been recovered by him from the customers "by way of excise duty." No material to that effect could be indicated. Secondly, it is a case where the amount was deposited for getting clearance of the goods from the factory and not on sale of the goods or transfer thereof to the customers. For levy of excise duty manufacture of excisable goods is the taxable event. It is, therefore, difficult to infer from the very fact of clearance of the goods from the factory on

payment of excise duty, that the goods had been sold or that the amount had been collected "by way of excise duty" from one else. It is a mere surmise. We also asked the learned counsel for the respondents to inform us whether there was any provision in the Act or the Rules empowering the authorities thereunder to refuse refund of the duty paid in excess of what was due under the Act either by mistake of law or otherwise on the ground that the amount had been collected by the manufacturer who deposited the same from its customers. In other words, whether the Act or the Rules contain any provision requiring the assessee to deposit all the collection made by them in excess of what is due under the Act with the State Government and on their failure to do so empowering the authorities or the Government to forfeit the same. No such provision could be pointed out. Our attention was, however, drawn to the decision of the Supreme Court in R, S. Joshi, Sale Tax Officer, Gujarat vs. Ajjt Mills Limited, (1977) 40 STC 497. We have carefully considered the said decision. In that case the question for consideration before the Supreme Court was whether it is permissible for the State legislature to enact, having regard to the triple list of the Seventh Schedule and Articles 14 and 19, that sums collected by dealers by way of sales tax but not exigible under the Sales Tax law, indeed, prohibited by it shall be forfeited to the public exchequer. The Supreme Court upheld the validity of the provisions and held that it was permissible for the State legislature to enact that sum collected by dealer by way of sales tax but not under the State law and prohibited should be forfeited to the public exchequer punitively. The said decision, in our opinion, does not help the respondents because there is no identical provision in the Central Excise Act empowering the authories to retain the money not exigible under the Act or to forfeit the same. This decision, on the other hand, supports the view that in the absence of any statutory prohibition, the State is obliged to refund the tax deposited by mistake to the person who deposited the same. If, for any reason, it does not want to refund the same to the person who deposited it but desires to retain it for refund to the person to whom the incidence might have been shifted it can do so only under the authority of a law enacted by the legislature to that effect, as had been done by the various State Legislatures in case of sales tax which have been referred to in R. S. Joshi, supra.
In the instant case we do not find any provision by resort to which the respondents could have recovered this amount from the petitioner had he not deposited the same under mistake of law. So also, as stated earlier, it could not be shown to us that this amount had been collected by the petitioner from the customers "by way of excise duty", though in our opinion that might have in no way helped the respondents in refusing to refund in the absence of statutory provision to that effect.

We have also considered the decision of the Bombay High Court in Roplas (India) Limited, supra, which has been referred to by the respondents in their counter. That case is, firstly, different on facts from the case before us. In that case the admitted position was that the whole of the excise duty involved in the claims had been

recovered from the customers. We may quote para 5 of the judgment: "It is fairly conceded on behalf of the petitioners that they have recovered from their customers the whole of the excise duty involved in all the three claims" We are of the view that sinc3 the petitioners have already recovered from their customers the whole of the duty, they are not entitled to its refund.

That is not the factual position in the case before us.

So far as the proposition of law laid down by Bombay High Court in Roplas, supra, to the effect that the petitioners were not entitled to claim refund under section 72 of the Contract Act as they had already recovered the same from the customers, is concerned, we find it difficult to accept the same. Firstly in our opinion, such an interpretation goes counter to the clear terms of section 72 of the Contract Act which is in the following terms :

"A person to whom money has been paid, or any thing delivered by mistake or under coercion, must repay or return it."

From a plain reading of the section itself it is clear that repayment contemplated under section 72 of the Contract Act is to be made to the person who made the payment, and to none else. Section 72 evidently refers to the two parties. In the case of payment of tax the two parties are the State or the authority to whom it is paid and the assessee who paid the same. The person to whom the ultimate incidence is or might have been shifted is not the person/who paid the money to the State. Such person cannot claim a refund from the State under section 72 of the Contract Act. In the absence of any specific law to that effect, to hold that tax paid by mistake of law need not be refunded under section 72 to the person who made such payment if it is found that he has shifted the incidence thereof to somebody else, would amount to rewriting section 72 by adding words which the legislature did not provide. That cannot be done because the Court can only interpret the lawit cannot itself enact the law. Tax paid under mistake of law can be recovered under section 72 by the person who made the payment. Shifting of the incidence by such person or recovery from his customers are not relevant considerations for deciding a claim for refund under section 72 of the Act. This view also gets support from the fact that section 72 equally applies to the assessee and his customers from whom he has allegedly collected the tax. Such customers can also claim refund of the same from him as payment made by mistake of law and in that event he will be bound to repay the same in view of the provisions of section 72 of the Contract Act. He will not be discharged of his liability to refund the same to the customers on the ground that he could not get it back from the State or the taxing authorities. The same analogy will apply to claims of refund falling under Rule 11. In those cases also, the authority concerned will have to make the refund to the assessee if the sum paid by him is found to be in excess of what is due under the Act. Shifting of incidence or the question of unjust enrichment are not relevant consideration for determining a claim of refund under section 72 of the Contract Act or Rule 11 of the Excise Rules.

If the Government wants to retain such excess collections with itself or refuse to make refund, it may make provisions to that effect, as has been done by the various State Government in their sales tax enactments the validity of which also have been upheld by the Supreme Court in R.S. Joshi, supra.

It may be pertinent to mention that the various State Governments while enacting laws to provide for forfeiture of amount collected by way of tax in excess of what is due under the law have also made specific provisions to the effect that payment of such amount to the State or forfeiture thereof by the State shall discharge the assessee of the liability to refund the same to the person from whom it has been collected. Such provision is most essential in view of the liability of the assessee to refund the amount to his customer under section 72 of the Contract Act as indicated above. The State or the taxing authorities cannot be allowed to retain such amount or refuse to refund without any authority of law. In that view of the matter, in our opinion, in the absence of specific law made by the Parliament to that effect, the authorities under the Act cannot refuse to repay taxes or monies deposited with by mistake of law to the person who made such deposit.

In view of the aforesaid discussions we are of the clear opinion that the respondents in the instant case were not justified in refusing to refund the amount of Rs.50.000/ to the petitioner, which admittedly was deposited by mistake in respect of clearances of goods which were exempt from payment of excise duty.

This petition is accordingly allowed. The respondents are directed to refund the amount of Rs.50.000/ (Rupees fifty thousand) to the petitioner within one month from today. No order as to costs.