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K.V.R. Constructions Vs. Commissioner of Central Excise

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Court : Karnataka

Decided On : Aug-11-2009

Reported in : 2010[17]STR6

Judge : Ram Mohan Reddy, J.

Acts : Finance Act, 1994 - Sections 83; Central Excise Act, 1944 - Sections 11B

Appeal No. : Writ Petition No. 16773 of 2009

Appellant : K.V.R. Constructions

Respondent : Commissioner of Central Excise

Advocate for Def. : N.R. Bhaskar, SCGSC

Advocate for Pet/Ap. : V.R. Balasubramani and ;M. Nagendra, Advs.

Judgement :
ORDER

Ram Mohan Reddy, J.

1. The petitioner carries on construction activity and in the process though not liable to pay service tax under Finance Act, 1994, nevertheless paid amounts through T.R.-6 challans as detailed below:

----------Sl. No TR 6 Challan No. Date Amount Paid----------1. 2005-06 14-12-2005 2381272----------2. 2005-06 14-12-2005 1246075----------3. 2005-06 7-1-2006 2396592----------4. 2005-06 20-4-2006 841500----------5. Nil 8-7-2006 1077120----------6. 2006-07 9-12-2006 1830560----------7. 2006-07 5-1-2007 2665872----------Total 12438991----------

2. Having noticed that the petitioner was not due and payable service tax, in the light of the Board Circular No. 80/10/2004 dated 17-9-2004, made a refund claim on 19-3-2008, which the office of the Asst. Commissioner of Central Excise-Service tax, received on 28-3-2008.

3. The Asst. Commissioner of Central Excise by order dated 19-11-2008 Annexure-C held thus:

5. Thus it is evident that if the building or the civil structure are for the use of organisations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit, the said services are not taxable, being non-commercial in nature. Since this clarification issued by the Board vide Circular No. 80/10/2004 dated 17-9-2004 is very clear on the issue, the construction services undertaken by M/s. K.V.R. Construction is not taxable in nature and the assessee is not liable to pay any service tax and he has paid it under the misunderstading of law. Since the amount collected by the Government is not at all payable by the assessee this amount would resemble the amount collected without any authority of law. Hence the amount paid by them is not service tax but in the nature of deposit with the Government. This issue has been discussed in the case of Commissioner of C. Ex., Kolkata-I v. M.A. Financial Services Pvt. Ltd. reported in 2006 (2) S.T.R. 350 (Tri. - Kolkata) and in the case of Hexacom (I) Ltd. v. Commissioner of C. Ex., Jaipur reported in : 2003 (156) E.L.T. 357 (Tri. - Delhi) and Motorla India Pvt. Ltd.

v. CCE, Bangalore-III in the Hon'ble High Court of Karnataka 2006 (206) E.L.T. 90 (Kar.). It has been held that any amounts are collected erroneously as representing service tax, which is not in force, there is no bar to the return of such amounts.

However, on an erroneous assumption that Section 83 of the Finance Act, 1994 provided application of the Central Excise Act 1944, for short 'Act' to service tax matters, relating to refund under Section 11B of the Act, rejected the refund claim as filed beyond the period of limitation under the said Section, denying the petitioners Rs. 1,23,96,948/- (Rs. 68,65,439 + Rs. 55,31,509). Hence this petition.

4. The Asst. Commissioner of Central Excise having recorded a positive finding that the petitioner was not liable to pay service tax in respect of the civil structures constructed for and on behalf of M/s. Adichunchanagiri Shikshana Trust put to use for education, religious, charitable, health, sanitation and philanthropic purpose, and not for the purpose of profit, in the light of the clarification issued by the Board vide Circular No. 80/10/2004 dated 17-9-2004, the amounts made over by the petitioner to the revenue, treated as a deposit at the hands of the Government, the question is whether Section 11-B of the Act is attracted to effect refund?

5. Section 11B provides for making a claim to refund duty. Admittedly, the sums deposited by the petitioner is held to be a deposit and not as a duty, therefore, there was no necessity for the petitioner to have made a claim invoking Section 11B of the Act for refund.

6. In the circumstances, the Asst. Commissioner of Central Excise by a misconception of law assumed that Section 11-B of the Act applied, so as to decline the petitioner's claim for refund of the amount in deposit, on the premise that the claim was beyond the period of limitation. The order impugned insofar as it relates to the denial of the claim for refund is unsustainable and is quashed.

7. The writ petition is ordered accordingly.

8. The 2nd respondent is directed to refund Rs. 1,23,96,948/- (Rs. 68,65,439 + Rs. 55,31,509) to the petitioner forthwith, in any event within a period of two weeks

from today.

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