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Doctrine of unjust enrichment not applicable in exports – Bombay High Court (HC)

21 June 2022

Summary

The Bombay HC noticed that the only contention of the authorities was that the petitioner has passed on the incidence of tax to the recipient and thus, the petitioner is not entitled to claim refund. The court held that when services are rendered abroad, then Central Goods and Services Tax (CGST) will not apply. The HC ruled that the petitioner is entitled to refund of input tax as the output service qualifies as an export of service. The Bombay HC opined that as the value of supply excludes the amount of Goods and Services Tax (GST), it is evident that there is no passing of incidence of tax. Thus, the HC held that the authorities had committed an error in rejecting the GST refund, which is unsustainable.

Facts of the case

- The petitioner[1] had entered into an agreement with ASCL[2], London to provide production services. As per a clause[3] of the agreement, the refund of tax received by the petitioner shall be reduced from the production expenses while computing the consideration towards such production services.
- The petitioner had received certain inputs/input services on which the tax has been paid as charged by vendors. The petitioner had filed refund application of such tax paid.
- A Show Cause Notice (SCN) was issued to the petitioner and the refund application was rejected on the ground that incidence of tax has been passed onto ASCL, resulting in unjust enrichment of the petitioner.
- The aggrieved petitioner filed appeal before the Appellate Authority, which was also rejected[4] on the ground that the burden of tax has been shifted on the service recipient and thus, any refund to petitioner would amount to unjust enrichment.
- The petitioner submitted that principle of unjust enrichment does not apply to export of services as it being a zero-rated supply.

Bombay HC observations and ruling[5]:

- **Services rendered are covered under export:** The HC noted that ASCL is located outside India, whereas the petitioner is in India. Further, the production services are rendered in London. Thus, it is clear that the services provided by the petitioner qualify as export of services.
- **Incidence of tax has not been passed on the recipient:** The HC stated that the petitioner is entitled to the refund of the amount if the incidence of tax has not been passed on to the recipient of the services. It is evident from the agreement that no incidence of tax has been passed. Further, the authorities could not establish that the incidence of tax has been passed on to the recipient located abroad.
- **CGST does not apply to services rendered abroad:** The HC stated that when the services are rendered abroad, CGST will not apply. In the present case, the petitioner has rendered services to

[1] Jar Productions Private Limited
[2] A Suitable Company Limited
[3] Clause 4.10
[4] placed reliance on the Supreme Court decision in Mafatlal Industries vs Union of India (2002-TIOL-54-SC-CX-CB)
[5] Writ petition No. 1143 of 2021 dated 9 June 2022

the ASCL abroad which amount to export of services. Thus, the Adjudicating Authority and the Appellate Authority committed an error in rejecting the refund of GST of the petitioner.

Our comments

Under the erstwhile regime, the Hon'ble Bombay HC in case of Indo-Nippon Chemical Company Limited[6] had held that there was no question of passing the burden of excise duty to the transferee, i.e., foreign buyer since it is undisputed position that credit was taken on inputs used in manufacture of goods for export. Later, the Apex Court dismissed the Special Leave Petition filed by the Union of India against the said decision.

The Mumbai CESTAT[7] while passing its decision in case of Sai Creation[8] had inferred from the above ruling and held that the provisions of unjust enrichment does not apply if the refund pertains to credit of duty on excisable goods used as inputs in the manufacture of exported goods.

Similarly, the Mumbai CESTAT in case of Motilal Oswal Securities Limited[9] had held that since the services are rendered abroad, the principle of unjust enrichment does not apply in case of export of service.

Even under the GST regime, the Central Board of Indirect Taxes and Customs (CBIC) has clarified through its FAQ[10] that the doctrine of unjust enrichment would not apply to refund claims arising on account of zero-rated supply and the proper officer need not satisfy himself, whether the incidence of tax has been passed on to any other person. Thereafter, the CBIC made amendment[11] in section 54(8) of the CGST Act, 2017 in respect of supplies to SEZs[12], so as to validate the applicability of the principle of unjust enrichment. Thus, the principle of unjust enrichment will be applicable in case of refunds against supplies to SEZs, even though such supplies are zero rated.

Hence, in case of exports, at the first place itself, the authorities are not required to enquire whether the incidence of tax has been passed or not.

Though, the Bombay HC has passed the ruling in line with the pre-GST era however, despite the clarification by the Board, the HC has unnecessarily examined the event of passing of incidence of tax.

[6] 2005 (185) E.L.T. 19 (Guj.) dated 22 February 2002
[7] Customs, Excise & Service Tax Appellate Tribunal
[8] 2013 (294) E.L.T. 637 (Tri. - Mumbai), 2017 (49) S.T.R. 32 (Tri. - Mumbai) dated 23 August 2012
[9] Appeal No.ST/189/2011 dated 16 November 2016
[10] FAQs on GST, 3rd Edition dated 15 December 2018
[11] vide CGST (Amendment) Act, 2018
[12] Special Economic Zones

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