

Service tax on import of services – Can refund be claimed for tax paid prior to 18.4.2006? – Dec 22, 2009

TIOL had very recently broken the judgment of the Hon'ble Supreme Court dismissing the SLP filed by the Department against the decision of the Bombay High Court in the National Shipowners Association case ([2009-TIOL-129-SC-ST](#)). Hence, it is now clear that service tax cannot be imposed on services imported prior to April 18, 2006. This automatically leads to the question related to the service tax collected by the Department prior to April 18, 2006 on the import of services and the possibility of refunds arising therefrom. The Department has been holding the view that the provisions of Section 11B of the Central Excise Act, 1944 imposing a one year limitation period would be applicable for any refund claim. Given the fact that the one year period has already ended vis-a-vis 18-4-2006, we should predict the Department to contend that there is no question of any refund being granted in respect of service tax paid on services imports prior to April 18, 2006. But a closer look at some of the decisions rendered by the Courts would prove otherwise.

As we know, Section 11B talks of a period of limitation of one year, from the "relevant date". As per the Explanation given to Section 11B, the "relevant date" means, in the case of goods manufactured or goods exported, etc., the date of payment of duty. In any other case, i.e. in a case which does not involve refund arising out of goods exported, etc., the "relevant date" would mean, the date of payment of duty, in terms of clause (f) of the said Explanation.

In *Union of India v. ITC Ltd*, the Supreme Court had held that when a payment which is not required by law was made, the Court has the power to order refund. A similar view was expressed by the Division Bench of the Madras High Court in *Collector of Customs, Madras v. Indo Swiss Synthetic Gem Manufacturing Co. Ltd.* (Interestingly, the appeal filed by the Department was dismissed by the Apex Court, as being time barred).

Section 11B of the CEA only talks only of a claim involving refund of duty of excise. Unfortunately, the all important word 'duty' has not been defined under the CEA. In the ITC case referred to above, the Apex Court had upheld the decision of the Division Bench of the Delhi High court which has held that and money which is realised in excess of what is permissible in law would be a realisation made outside the provisions of the Act.

Moreover, in my view, the words " any person claiming refund of any duty of excise" used in Section 11B cannot possibly cover a case of an importer of services, who has paid an amount which cannot be considered as service tax, prior to April 18, 2006 as such amount cannot be considered as "duty" within the meaning of Section 11B.

In another interesting case, viz. *India Cements Ltd v. CCE*, [2002-TIOL-433-SC-CX](#), the Apex Court had held that any amount paid by mistake cannot be termed as 'duty' and the time-bar prescribed by Section 11B will not apply for seeking refund.

The Department's favourite weapon to ward off refund claims, is the celebrated case law involving *Mafatlal Industries Ltd v. Union of India* [2002-TIOL-54-SC-CX](#). In my opinion, a view cannot be taken that the Apex Court's decision in the Mafatlal case applies to refund claims in respect of amounts which cannot be considered as 'duty' in the first place and that, the decision of the Madras High Court in the *Indo Swiss Synthetic Gem Manufacturing Co Ltd's* case is an excellent case law, coming as it did, after the pronouncement of the Constitution Bench's judgment in the Mafatlal case.

In my view, therefore, there is absolutely no bar for importers of services who have not availed of cervat credit in respect of the 'service tax' paid in respect of services imported prior to April 18, 2006, from claiming refund of such 'service tax' amounts, with the Department. Services Importers who have availed of cervat credit in respect of the service tax paid on services imports cannot claim refund of the service tax paid prior to April 18, 2006 as they would be hit by the doctrine of unjust enrichment.

The Department could possibly end with refunding hundreds of crores of rupees of 'service tax' collected on import of services, prior to April 18, 2006.