THE HON'BLE SRI JUSTICE L. NARASIMHA REDDY
AND
THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

WRIT PETITION No.11171 of 2012

(Judgment of the Bench delivered by
the Hon'ble Sri Justice L. Narasimha Reddy)

% 15-09-2014

#Visakhapatnam Stevedores Association
..petitioner

Vs.

$The Union of India, rep., by its Secretary,
Ministry of Shipping, New Delhi and others
..Respondents

!Counsel for the petitioner : Sri S.R. Ashok, Sr. Counsel

^Counsel for the Respondents : Sri A.V. Krishna Koundinya,
Sr. Counsel

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? Cases referred

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JUDGMENT: (*Per the Hon'ble Sri Justice L.Narasimha Reddy*)

This Writ Petition is filed with a prayer to declare the action of the Visakhapatnam Port Trust, the second respondent herein, in not refunding the amount that has been collected in the nature of Fringe Benefit Tax (FBT) between 2005 and 2009 from the members of the petitioner-Association despite repeated demands, as illegal, arbitrary and contrary to the provisions of the Income Tax Act, 1961 (for short 'the Act'), apart from being unconstitutional. Consequential direction for refund of the amount of Rs.7,40,69,450/- with interest at the rate of 14.75% per annum is sought.

The facts, in brief, are that at the Visakhapatnam Port, several ships arrive for loading and unloading purposes. The Visakhapatnam Dock Labour Board (for short 'the Board') was constituted with a view to regulate the work force needed for that purpose. The Board would supply the required manpower for loading and unloading of the ships. To act as a bridge between the ship owners on the one hand, and the Board, on the other hand,
the institution of 'Stevedores' is introduced. The Board grants licences to the concerned individuals or agencies to act as stevedores, and on being so recognized, the stevedores are supplied the work force by the Board. Over the period,
the Board was merged with Visakhapatnam Port Trust,
the 2nd respondent herein.

The Parliament amended the Act providing for levy of tax on the fringe benefits paid to the employees. The liability to pay the tax, on this account, however, was placed upon the employer. The Board felt that it is under obligation to pay the FBT in respect of the employees/workers on its rolls. Since the wages for the workers are paid by the stevedores, it was resolved to collect the FBT for the concerned employees, from the respective stevedores. The tax is on the fringe benefits paid to each employee. However, a formula was evolved to collect Rs.1/- for each metric tonne of the material handled by the stevedore for onward payment of FBT, to the Income Tax Department. Between the years 2005 and 2009, a sum of Rs.7.00 Crores was collected towards FBT from the stevedores

i.e., the members of the petitioner-association.

The petitioner contends that the Board and the second respondent herein were registered under Section 12 of the Act, and accordingly they stood exempted from the obligation to pay tax; and still the FBT was collected. They submit that whatever may have been the justification for collecting the amount, when there was some uncertainty as to the liability of the 2nd respondent to pay the FBT, at least when the Tribunal decided finally in the year 2010 that the 2nd respondent is not liable to pay the FBT, the amount ought to have been refunded, more so, when it was not remitted to the Income Tax Department.

A detailed counter-affidavit is filed by the 2nd respondent. The fact that the FBT at the rate of Rs.1/- per metric tonne of handled material at the port was collected, is not disputed.

It is, however, stated that the amount had to be collected, to be

on safe side, and the amount so collected was kept in a separate account, so that, it can be paid in the event of any determination or fastening of liability. A plea is raised to the effect that the association cannot make a demand, since the amount was collected from the various stevedores. It is also urged that the respective stevedores have passed on the liability of FBT paid by them, to their ultimate customers, be it the ship owners or goods transporters, and that they are not liable to refund the amount. Difficulty is also expressed about the identification of the members from whom it was collected.

Heard Sri S.R. Ashok, learned Senior Counsel for the petitioner and Sri A.V. Krishna Koundinya, learned Senior Counsel for the respondents.

It is not uncommon that the employees in the establishments, particularly those, which are large in size, provide for payment of fringe benefits to their employees. Taking into account, the fact that the benefits so paid are many a time phenomenal in quantum, the Parliament introduced the provision for levy of FBT, in the form of addition to Section 115W to 115WL in Chapter XII-H of the Act through the Finance Act, 2005. It is the obligation of the employer to pay the FBT.

In the introductory part itself, it has been mentioned that the Board, which has since merged with the 2nd respondent, would have several employees on its rolls, and they, in turn, are allotted to the stevedore contractors for the purpose of loading or unloading the ships. Though the wages for the allotted employees/workers are paid by the concerned stevedore contractors, the 2nd respondent happens to be the actual employer. Therefore, the obligation, if any, to pay the FBT, rests with the 2nd respondent.

In case the Income Tax Department made any demand against the 2nd respondent for payment of FBT, and that, in turn, collected the corresponding amount from the members of the petitioner-association, there would not have been any serious objection. The reason is that the agency, which is under obligation to pay the wages and fringe benefits, is equally, under obligation to pay the tax also. It is a matter of record, that the 2nd respondent got itself registered under Section 12 of the Act, and thereby, became exempted from payment of the tax. Dispute in relation to some other aspect, arising under the Income Tax, was said to be pending.

May be as a precautionary measure, the 2nd respondent, and its predecessor intended to collect the amount, representing the FBT, from the members of the petitioner-association, so that the same can be paid, in the event of there being any demand from the Income Tax Department. Instead of taking into account, the fringe benefits to be paid to the employees/workers and determining the proportionate FBT thereon, the Board of Management of the 2nd respondent evolved a formula, in this behalf, through its resolution dated 28-07-2005. It reads:

> "The Board resolved to adopt the Minutes of the Meeting No.2 held on 04-06-2005 and Circular Resolution No.42/2005 dated 23/30-06-2005. Shri K.V. Krishna Kumar stated that with regard to the Board Resolution No.40/2005, for the purpose of clarity, it was decided to collect fringe Benefit Tax from an easily measurable point without double accounting. Hence, the Board resolved to collect a special levy towards Fringe Benefit Tax liability of VDLB from the employers of the Registered Scheme
> on the Stevedoring Tonnage @ Rs.1/- per M.Tonne wef
> 01-08-2005."

Accordingly, the amounts were being collected from the concerned members of the petitioner-association, and by 2012,
it aggregated to about Rs.8 crores.

The fact, however, remains that neither there was any demand by the Income Tax Department, against the

2nd respondent, for payment of FBT, nor, in fact, any amount was paid on that account. The amount recovered from the members of the petitioner-association was deposited in a separate account, from time to time, and it is also earning interest.

The petitioner has been making demand for refund of the amount of Rs.8,30,03,737/-. Even in the counter-affidavit, the 2nd respondent did not plead any justification, worth its name, for withholding the amount. The only plea raised was, with regard to the levy of service tax of Rs.46,91,187/- by the Central Excise Department. The appeal in relation thereto is said to be pending with the CESTAT southern Bench. The inclination on the part of the 2nd respondent to refund the amount is also signified in paragraph 12 of the counter-affidavit. It reads:

> "It submit in reply to Para 19 of the affidavit of the Petitioner that the F.B.T amount was shown as 'liabilities' on the balance sheet and the amount was kept in a separate account known as F.B.T till the finalization of the case. In this regard it is further submitted that while furnishing a clarification to CESTAT authorities, it is stated under protest, that the FBT is collected from the employers and credited under liability with a condition that as a consequence of the income Tax appeal, if it is not liable to FBT, the amount so collected will be refunded to the firms."

The Tax Appeal is only in relation to service tax and not about the income tax. Once there is no demand, much less payment of the FBT by the 2nd respondent to the Income Tax Department, there does not exist any justification to withhold the amount.

Across the Bar, it is argued that the refund of the amount may result in undue enrichment of the members of the petitioner-association, and sometimes, it may even be difficult to identify the persons, from whom it is collected. As regards the first contention, it has to be kept in mind that the collection of the amount by the 2nd respondent was not in exercise of any sovereign powers. It is only when a Government, in its sovereign power, collects the amount, and there is likelihood of the benefit, not reaching the end customer, that the principle of undue enrichment will come into play. The underlying principle is that if a trader collected tax from the customer and paid to the exchequer, the refund thereof, on account of the adjudication must, naturally reach the person who paid it, and not an intermediary. Even where such amount is withheld, it goes to the State exchequer and becomes available for the welfare of the public at large. The 2nd respondent, which has no traits of sovereignty, cannot be permitted to take such a plea.

At any rate, when the amount was collected from a specified stevedore contractor, and the contractor in turn has undertaken the work with the owner of a ship, for loading or unloading, on a lump sum, the theory does not have any application.

As regards the second, namely, the difficulty in identifying the agency to be refunded, even the petitioner did not insist that the amount should be paid to it. Its endeavour is only to ensure that the amount is refunded to the concerned agency from whom it was collected. The 2nd respondent would have the liberty to undertake proper verification, in the context of refunding the amount. If any doubt exists, in this regard, correspondence can be entertained, either with the agency, or with the petitioner. It is only on full satisfaction of the 2nd respondent, about the identity of the agency, that the relevant amount can be refunded.

The Writ Petition is therefore allowed directing that:

(a) The second respondent shall be under obligation to refund the amount collected towards the FBT along with accrued interest to the respective stevedores from whom it was collected duly identifying them, within two months from the date of receipt of a copy of this order.

(b) We also make it clear that the second respondent shall not be under any obligation towards FBT for the benefits paid to the employees supplied by it to the stevedores.

(c) If any doubt is entertained in this behalf as to the identity, it is open to the second respondent to seek necessary information or clarification from the petitioner, and

(d) If the 2nd respondent paid any service tax on the amount collected by it towards service tax, it need not refund the same.

The Miscellaneous Petitions filed in this Writ Petition shall stand disposed of. There shall be no order as to costs.

L.NARASIMHA REDDY, J.

CHALLA KODANDA RAM,J.

Dt.15-09-2014

Note:
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