

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 30.01.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

C.M.A. NO. 1054 OF 2009

Commissioner of Central Excise
Chennai - I Commissionerate
26/1, (Old No.121), M.G.Road
Chennai 600 034.

... Appellant/Respondent

- Vs -

M/s.Dollar Company Pvt. Ltd.
No.15, Cross Road, Tondiarpet
Chennai 600 081.

.. Respondent/Appellant

Appeal filed under Section 35-G of the Central Excise Act against the order dated 28.08.08 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.930 of 2008 against the arising out of the Commissioner of Central Excise (Appeals) Chennai 600 034 in A.No.48/99(M-I) order dt. 10.4.2000 against the order of the Assistant Commissioner of Central Excise 'C' Division Chennai-I, Commissionerate Chennai -34 in O.NO.IV/10/76/98/RF order dated 15.02.1999.

For Appellant : Mr. Rajinish Pathiyil

For Respondents: Mr. S.Jayakumar

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in dismissing the appeal filed by it, the Revenue is before this Court by filing the present appeal. This Court, vide order dated 14.12.09, framed the following substantial questions of law for consideration :-

"i) Whether on the facts and circumstances of the case, the Appellate Tribunal is right in dismissing the Department's appeal placing reliance on the decision of the Apex Court in the case of Mafatlal

Industries, passed during 1997, in respect of provisional assessment when a new provision clause (eb) to Explanation B in Section 11B of the Central Excise Act, 1944, was enacted with effect from 01.08.1998 by virtue of which the refund on finalization of the provisional assessment after 01.08.98 is governed by Section 11B of the Act?

ii) Whether the Appellate Tribunal was right in dismissing the Department's appeal on the ground that the amendment was made to Rule 9B (5) of the Central Excise Rules, 1944, with effect from 25.06.99 particularly when a legislative amendment was introduced in Section 11B of the Act from 01.08.1998 onwards by insertion of clause (eb) to Explanation B in Section 11B of the Act?"

2. The brief facts of the case are that the respondent/assessee is engaged in the manufacture of pharmaceutical preparation falling under Chapter 30 of the First Schedule to the Central Excise Tariff Act, 1985. The assessee cleared products as Ayurvedic medicine falling under Chapter 3003.30 of the Central Excise Tariff Act and paid excise duty at 8%. The Department, however, classified the product as skin care preparation falling under 3304 of the Central Excise Tariff Act and duty chargeable at 30%. The Assistant Commissioner of Central Excise, by Order-in-Original No.81/97 dated 30.12.97 finalised the issue and held that the goods fall under Chapter 3304 as stated in the show cause notice and demanded differential duty. The respondent/assessee, it appears, filed revised declaration classifying the product under Chapter 3304 and paid differential duty of 22% under protest.

3. The respondent/assessee preferred appeal against the order of adjudication and the Commissioner (Appeals) set aside the order of the original authority in Appeal No.140/98 (M-1) dated 21.8.98 and held that the product is classifiable under Chapter sub-heading 3003.30 as Ayurvedic medicine. Immediately thereafter, on 21.9.98, refund application was filed, i.e., to say within one month from the date of the order of the Commissioner (Appeals). The Department, however, was not happy with the classification and, therefore, proceeded with the matter by filing appeal before the Tribunal.

4. The Tribunal, on consideration of the case, confirmed the order of the Commissioner (Appeals) against which the Department is now on appeal before the Supreme Court on the question of classification.

5. On the application filed for refund based on the order of the Commissioner (Appeals) in Appeal No.140/98 (M-1) dated 21.8.98, the Original Authority rejected the refund against which the assessee moved an appeal before the Commissioner (Appeals), who set aside the

order of the Original Authority and ordered refund. On appeal to the Tribunal, the Tribunal confirmed the order of the Commissioner (Appeals), against which the present appeal is filed by the Department raising the above substantial questions of law.

6. It is submitted by the learned counsel appearing for the respondent that insofar as the first question of law is concerned, the assessee had filed the refund application well within the time of one year as provided in Section 11-B of the Act, more particularly to say, within one month from the date of the order passed by the Commissioner (Appeals) and, therefore, the first substantial question of law has to necessarily fail. Insofar as the 2nd substantial question of law is concerned, it is the submission of the learned counsel for the respondent/assessee that the applicability of Section 11-B and amendment to Rule 9B (5) of the Central Excise Act are in issue, but the same is not applicable in view of the fact that the period is prior to the assessment dated 25.6.99. Reliance was placed on the decision of the Supreme Court in Commissioner of Central Excise, Chennai - Vs - T.V.S. Suzuki Ltd. (2003 (156) ELT 161 (SC)).

7. Heard the learned standing counsel appearing for the appellant/Department and the learned counsel appearing for the respondent/assessee and perused the materials available on record.

8. Even at the outset, it can safely be said that the first substantial question of law is misconceived in the facts of the present case. Section 11B of the Central Excise Act relates to claim for refund of duty and explanation (B) to the said Section speaks about "relevant date" and clause (eb) deals with the date of adjustment of duty after the final assessment. For better clarity, reference can be made to Explanation (B) and clause (eb) to Section 11B of the Central Excise Act, which are extracted hereunder :-

"Section 11B. Claim for refund of duty - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in the form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person;

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under

this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act.

* * * * *

Explanation -

(A)

(B) "relevant date" means, --

(a)

(i)

(ii)

(iii)

(b)

(c)

(d)

(e)

(ea)

(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(f)"

9. In this case, there is no doubt that clause (eb) to Explanation B of Section 11B is squarely applicable and the assessee also does not dispute the same. But the only issue that is raised here is that whether the refund claim has been made in terms of the said provisions. It is evident from the records that the order of the Commissioner (Appeals) is dated 21.8.98 and the refund claim has been made by the assessee on 21.9.98. Therefore, for all purposes, the relevant date will be the date of adjustment of the duty after final assessment made thereof. In this case, consequent to the order of the Commissioner (Appeals), the refund claim was made. Therefore, it is clear that the date is well within the time stipulated under Section 11B and there can be no dispute raised by the Department on this aspect. Accordingly, the first substantial question of law becomes totally irrelevant and does not require to be answered.

10. The 2nd question of law raised is whether Notification No.45/99-C.E. (N.T.) dated 25.6.1999 would be applicable to the facts of the present case.

11. By virtue of the amendment, the provisions to sub-section (2) to Section 11B becomes applicable to the issues relating to provisional assessment of duty, whereby the provisions of unjust enrichment stood attracted.

12. In the present case, we are concerned with the period prior to amendment dated 25.6.99. On this issue, reliance was placed by the respondent on the decision of the Supreme Court in the case of Commissioner of Central Excise, Chennai - Vs - T.V.S. Suzuki Ltd.

(2003 (156) ELT 161 (SC)). In the said case, the plea of refund claim, which was rejected by the Original Authority, was considered in the light of the amendment to Rule 9B (5) and in the said decision, the Supreme Court held that introduction of sub-rule (5) to Rule 9B is not retrospective in operation. In the said decision, the Supreme Court held as under :-

"In Mafatlal Industries Ltd (supra) a Bench of nine learned Judges of this Court held that refund claims consequent upon the adjustment under sub-rule (5) of Rule 9B would not be governed by the restrictions of Section 11A or Section 11B, as the case may be. This Court observed (vide paragraph 104) as under:

"Rule 9-B provides for provisional assessment in situations specified in clauses (a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that " when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9-B will not be governed by Section 11-A or Section 11-B, as the case may be."

In order to get over the situation arising under Mafatlal Industries Ltd. (Supra) vide notification No. 45/99-CE (NT) dated 25.6.1999, an amendment was made in sub-rule (5) of Rule 9B by adding a proviso thereto. The effect of the proviso is that, even after finalization of the provisional assessment under Rule 9B (5), if it is found that an assessee is entitled to refund, such refund shall not be made to him except in accordance with the procedure established under sub-section (2) of Section 11B of the Act.

There is no dispute that the refund claim in this case was made much prior to the addition of the proviso in sub-rule (5) of Rule 9B. On the date on which the refund claim was made, the law applicable was the law as declared by this Court in Mafatlal Industries Ltd. (supra) which we have reproduced above. However, it is contended by the learned counsel Shri Verma for the department, that the claim of refund would be governed by the proviso introduced in

sub-rule (5) of Rule 9B, and that as a consequence, the restrictions in Section 11A and Section 11B with regard to the procedure for refund would apply to the case of the respondent. The same question came up for consideration of this Court in Sinkhai Synthetics & Chemicals Pvt. Ltd. v. C.C.E., Aurangabad, (2002) 143 E.L.T. 17 SC. This Court took the view that the case would be governed by the rule laid down in Mafatlal Industries Ltd. (supra). This view has been reiterated in a subsequent judgment of this Court in C.A. No. 2533 of 2001. (Commissioner of Central Excise, Meerut v. M/s. Star Paper Mills Limited, [2003] 7 SCC 27) upholding the view of the tribunal that the refund claim of the assessee before the court was justified.

Shri Verma fairly concedes that the proviso introduced in sub-rule (5) of Rule 9B cannot be said to be retrospective in operation. He, however, contends that on the date on which the proviso was brought into force, i.e. 25.6.1999, the refund claim was still pending with the departmental authorities and, therefore, it had to be adjudicated in accordance with the law as it became enforceable from 25.6.1999. In our view, this contention cannot be accepted. Merely because the departmental authorities took a long time to process the application for refund, the right of the assessee does not get defeated by the subsequent amendment made in sub-rule (5) of Rule 9B. The Commissioner of Central Excise and the CEGAT were, therefore, justified in holding that the claim for refund made by the respondent had to be decided according to the law laid down by this Court in Mafatlal Industries Ltd. (supra) and would not be governed by the proviso to sub-rule (5) of Rule 9B.

In the result, we find no merit in appeal. The appeal is accordingly dismissed. However, there shall be no order as to costs Civil Appeal Nos. 2891/2001, 8380/2001 and 610-611/2002 In all these appeals the question which arises for our consideration is identical. The refund claims were made pursuant to the finalisation of provisional assessment orders and prior to 25.6.1999, i.e. the date on which the proviso to sub-rule (5) of Rule 9B came into force. In our view, therefore, all these cases would be governed by the rule in Mafatlal Industries Limited (supra) namely that the restrictions in Section 11A and Section 11B would not apply to refund claims consequent upon finalisation of provisional assessment orders."

13. A reading of Section 9B (5) coupled with the judgment of the Supreme Court in TVS Suzuki case (supra), this Court is of the considered view that in the present case also, the refund claim was made on 21.9.98, long before sub-rule (5) to Rule 9B came into force. Therefore, the said decision of the Supreme Court is squarely applicable to the facts of the present case. Accordingly, the 2nd substantial question of law is answered in favour of the assessee and against the Revenue.

14. In the result, the appeal fails and the same is dismissed confirming the order passed by the Tribunal. In the circumstances of the case, there will be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

GLN



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To

1. Commissioner of Central Excise
Chennai - I Commissionerate
26/1, (Old No.121), M.G.Road
Chennai 600 034.

2. Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench Chennai.

3. The Commissioner of Central Excise (Appeals)
Chennai 600 034.

+ 1 cc to Mr.Rajnish Pathityil, Advocate Sr.5021
+ 1 cc to Mr.S. Jaikumar, Advocate Sr.4829

C.M.A. NO. 1054 OF 2009

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