

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 06.03.2015

CORAM

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

C.M.A. NO. 961 OF 2008

AND

M.P. NO. 1 OF 2008

Commissioner of Customs (Exports)
Custom House, Chennai 600 001. Appellant/Appellant

- Vs -

1. M/s.Sayonara Exports Pvt. Ltd.
Kapadia Chambers, 1st Floor
51, Broach Street, Mumbai 400 009.
2. Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench, Shastri Bhavan Annexe
1st Floor, 26, Haddows Road
Chennai 600 006. Respondents/Respondents

Appeal filed under Section 130 of the Customs Act against the order dated 18.8.06 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.740/2006.

For Appellant : Mr. P.Mahadevan

For Respondents : Mr.S.K.Visvanath for
Mr. B.Satish Sundar for R-1

R2 : Tribunal

JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in dismissing the appeal filed by it, the appellant/Revenue is before this Court by filing the

present appeal. Though, this Court had initially admitted the appeal as early as on 19.3.08 by framing substantial questions of law, with the consent of the counsel on either side, the same were reframed by this Court on 24.2.15. The reframed substantial questions of law are as hereunder :-

"i) Whether the Tribunal was right in holding that the 1st respondent is entitled for automatic refund of the Extra Duty Deposit made pending finalisation of the provisional assessment without filing an application for refund under Section 27 of the Customs Act, 1962?

ii) Whether the Tribunal is right in not considering the legal issue that there cannot be an order of refund without application and that the application should be within the time stipulated in the statute?

iii) Whether the extra duty deposit made by the 1st respondent partakes the character of customs duty so as to attract the provisions of Section 27 of the Customs Act?

iv) Whether the claim of the respondent for refund would be contrary to the decision of the Supreme Court in the case of Mafatlal Industries - Vs - Union of India (1997 (98) ELT 247 (SC))?

2. The facts, in a nutshell, are as hereunder :-

The 1st respondent imported RDB Palmolein (edible grade) and paid extra duty deposit (for short 'EDD') of Rs.1,13,004/= for the purpose of provisional assessment of the imported goods, pending survey report. On submission of the report, the Department finalised the provisional assessment on 9.6.00 and forwarded the file to the Refund Section for refund of the EDD. The Assistant Commissioner of Customs (Refund), suo motu, passed an order on 15.9.05 holding that no refund application has been filed as required under Explanation II to Section 27 of the Act and the refund application should have been filed within six months from the date of finalisation of provisional assessment and, therefore, rejected the claim. The relevant portion of the order is extracted hereinbelow :-

"On perusal of the documents, it is observed that the importer has not filed any refund application as required under the explanation II to Section 27 of the Customs Act, 1962 as per which the importer/claimed has to file the refund applications within 6 months from the date of finalisation of the provisional assessment. In the instant case, the assessment was made finally on 9.6.2000, whereas the

importer has not filed any refund application, therefore, no refund will accrue will accrue to the importer/claimant. Therefore, I pass the following order in view of above discussion :

ORDER

I reject the refund amount of Rs.1,13,004/= as not claimed."

3. Aggrieved by the same, the respondent/importer went on appeal before the Commissioner (Appeals), who, on the facts of the case, allowed the appeal holding that the EDD is only a deposit as a protection to safeguard the interests of the Revenue and it is not a deposit of difference in terms of Section 27 of the Act. For better clarity, the relevant portion of the order is extracted hereunder :-

"The same analogy would apply to extra duty deposit as has been held in respect of pre-deposit above. In the case of Suvidha Ltd. - Vs - UOI reported in 1996 (086) ELT 177 (Bom)), it was held that

"Refund of pre-deposit made under Section 35F of the Central Excises and Salt Act, 1944, for availing right of appeal - Section 11B of the Central Excises and Salt Act can never be applicable to such deposit since it is not a payment of duty but only a pre-deposit for availing the right of appeal"

The extra duty deposit of 1% has been obtained from the appellants as a precaution to safeguard the interests of revenue. If after final assessment any part of this deposit is found in excess it is liable to be refunded suo motu once the bill of entry is finalised, or atleast on a simple letter request by the importer, without making him run from pillar to post.

In my view the term 'extra duty deposit' is a misnomer and has to be understood correctly as nothing that is collected 'extra' or over and above what is allowed under the statute can be termed as a duty. What is meant is that an extra amount has been deposited towards duty liability that may arise in future as a safeguard and not as an advance deposit of extra duty, as the amount collected cannot be treated as duty until and unless the said deposit is adjusted towards such duty on finalisation thereof as per law. This is opposed to the duty already paid towards the declared quantity of the goods, where

they would have been eligible for a refund of Rs.7,164/= owing to the shortage, if they had filed a claim on time for the same in keeping with Explanation II to Sec. 27 ibid.

Since this appeal is with respect to EDD and in view of the discussions above, the extra duty deposit made cannot be treated as a duty for the purpose of Explanation II to Section 27 and the said amount is liable to be refunded to the appellants. The appeal therefore succeeds. The case is disposed of as above."

4. Aggrieved by the order of the Commissioner (Appeals), the Department pursued the matter before the Tribunal. The Tribunal, while taking note of the fact that provisional assessment was finalised on 9.6.00, the file was forwarded to the refund section for refund of EDD and taking note of the statutory prescription, which says that the assessee is entitled to refund upon finalisation of assessment, it held that there is no need to insist on a formal claim for refund. For better clarity, the relevant portion of the order of the Tribunal is quoted hereinbelow :-

"2. The provisions of Section 18 of the Customs Act governing provisional and final assessments of imports and exports are similar to the provisions of erstwhile Rule 9B of the Central Excise Rules, 1944. Under either of these provisions, any excess amount of duty found upon finalisation of assessment is liable to be paid to the assessee who is entitled to refund. In the present case, the original authority refused to refund the EDD to the respondents, thereby defeating the very purpose for which the file was sent to the authority by the Assessing Group. This illegality was corrected by learned Commissioner (Appeals) following a decision of the Tribunal relating to a similar claim for refund of EDD. The appellant has not found fault with the reliance placed by the learned Commissioner (Appeals) on the Tribunal's decision. In the circumstances, the appeal of the department is bereft of bona fides and the same is dismissed."

Aggrieved by the said order of the Tribunal, the appellant/Revenue is before this Court by filing the present appeal.

5. Learned standing counsel appearing for the Revenue placed emphasis on para-104 of the order of the Supreme Court in Mafatlal Industries Ltd. & Ors. - Vs - Union of India (1997 (5) SCC 536) to

drive home the point that the provisions of Section 27 of the Customs Act analogous to Section 11B of the Customs Act will be applicable to the facts of the present case. To a specific question raised as to which of the two situations envisaged in para-104 would be applicable, learned counsel fairly conceded that the first situation envisaged in para-104 would be applicable. For better clarity, the said portion of the order is extracted hereunder :-

"104. 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. However, if the final orders passed under sub-rule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11-B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9-B (5) re-agitating the issues already allowed, it would obviously be governed by Section 11-B. It follows logically that position would be same in the converse situation." (Emphasis supplied)

6. Admittedly, it is not the case of the department that provisional assessment order, which has been finalised, is the subject matter of further appeal or any proceeding before any forum and, therefore, the second situation envisaged in para-104 of the decision of the Supreme Court in Mafatlal Industries case (supra) will not apply. Further, Sections 11B and 9B of the Central Excise Act are pari materia to Sections 18 and 27 (2) of the Customs Act.

7. The contention of the Department that the provisions of Explanation II to Section 27 of the Act would apply, as is stated in the original order, does not arise in a case of refund, which is the case on hand, as the claim in the present case arose prior to 13.7.06. The said aspect has been clarified by the Gujarat High Court in Commissioner - Vs - Hindalco Industries Ltd. (2008 (231) ELT 36 (Guj.)), which view has been affirmed by the Delhi High Court in Commissioner of Customs - Vs - Indian Oil Corporation (2012 (282) ELT 368 (Del.)), wherein the Delhi High Court held as follows :-

"11. Gujarat High Court in the case of Hindalco Industries Ltd. (supra) on the other hand has referred to and considered the amendment to Section 18 of the Act whereby sub-Sections 3, 4 and 5 have been inserted from 13.7.2006 and, inter alia, held as under :

"18 On a plain reading it becomes apparent that Sub-sections (3) and (4) relate to liability to pay interest or entitlement to claim interest consequent upon final assessment Order. However, Sub-section (5) is the material amendment which indicates that the Proviso appearing below Sub-section (2) of Section 27 of the Act has now been incorporated as a part of Section 18 of the Act. On a plain reading the distinction between Section 18 as it stood prior to amendment, i.e., upto 12th July, 2006 and subsequent to the amendment, i.e., with effect from 13th July, 2006 becomes apparent. The difference is stark and revealing and it is not possible to agree with the contention of Revenue that such amendment has to be understood as clarificatory in nature. This is more so, when one reads the amendments made in 1998 and the amendment made in Rule 9B of the Central Excise Rules in 1999 considering the pronouncement of the Apex Court as to the distinction between making of a refund and claiming of a refund; the amendment cannot be considered to be retrospective in nature; and cannot be made applicable to pending proceedings.

19. This can be considered from a slightly different angle. While introducing the Taxation Laws (Amendment) Bill, 2005 (Bill No. 74 of 2005) the Notes on Clauses in relation to Section 18 of the Act indicate that Sub-sections (3), (4) and (5) to Section 18 of the Act, have been inserted to provide for a mechanism to regularise the payments of duty short levied and interest thereon

and duties that are to be refunded on finalization of provisional assessment and in this context in the report of the Standing Committee on Finance it has specifically been noted that this amendment became necessary because Section 18 of the Act which provides for provisional assessment of duty presently (i.e. upto 12th July, 2006) does not provide for various issues arising from the finalization of provisional assessment. Thus it becomes apparent that the amendment in question is substantive in nature when one finds that various provisions have been inserted which were not forming part of the original Section 18 of the Act as it stood upto 12th July, 2006. It is not possible to state that the provisions for payment of interest on duty short levied or entitlement to interest on duty paid in excess of the finally assessed duty can be considered to be clarificatory provisions and in the same vein the newly inserted Sub-section (5) deserves consideration. Thus in effect upto 12th July, 2006 no provision existed in Section 18 of the Act which would permit Revenue to invoke principles of unjust enrichment in relation to duty paid in excess, found to be so, upon finalization of provisional assessment under Section 18 of the Act.

20. Hence, the reference to provisions of Section 27 of the Act which generally deals with claim for refund of duty cannot be of any assistance to the Revenue. Similarly the definition of the term assessment under Section 2(2) of the Act also cannot help the Revenue in light of the specific provisions of Section 18 of the Act which override all other provisions of the Act. The contention that the Court should not permit a person to derive unjust benefit also does not merit acceptance. The Court can only read the provisions and the statute as they stand, and if necessary, interpret the same but the Court cannot legislate. This is a salutary principle of interpretation. Furthermore, as noticed hereinbefore, the Apex Court has in no uncertain terms drawn the distinction between making of refund and claiming of refund. The High Court cannot equate the two in light of the

authoritative pronouncement of law by the Apex Court.

21. Therefore, on both counts, in light of the authorities referred to hereinbefore, and on interpretation of provisions of Section 18 of the Act, on finalisation of assessment if any excess duty is found to have been paid at the time of provisional assessment Revenue is bound in law to make the refund without any claim being required to be made by an Assessee. This would be the position in law upto 12th July, 2006 and not thereafter."

* * * * *

18. We may notice here that Gujarat High Court in the case of Hindalco Industries (supra) has specifically referred to decision in the case of Allied Photographic India Ltd. (supra) but the said case has not been noticed by the Bombay High Court in the case of Bussa Overseas and Properties Pvt. Ltd. (supra). The decision of the Gujarat High Court in the case of Hindalco Industries Ltd. (supra) has been followed by Orissa High Court in CCE, C. & ST, Bhubaneswar - I Vs. Paradeep Phosphates Ltd. 2010 (252) ELT 502 (Ori.). The said decision also refers to the three earlier judgments of the Supreme Court mentioned above.

19. We have considered Explanation II to Section 27 (1) and whether in view of the said Explanation, the respondent assessee was required to move an application under Section 27 of the Act and accordingly, the conditions stipulated in sub-section (2) of the Act are applicable. We may now notice here that the two situations, which have been specifically referred to by the Gujarat High Court in the case of Hindalco Industries Ltd. (supra). Two situations are as under :

"9.1 Referring to Explanation II to Section 27 of the Act it was submitted that the same would apply to a case where after the final assessment and the adjustment, if still the Assessee is not satisfied with the adjustment and claims excess amount as refund. Explanation II will have no application in cases where admittedly after final adjustment, refund is due to the Assessee. This is explained with the following illustration:

Duty paid provisionally Rs. 100

Duty finally assessed Rs. 60

Duty to be refunded Rs. 40

In this case Explanation II will have no application since no claim for refund is made and Rs. 40 is to be refunded since the same is admittedly due.

Duty paid provisionally Rs. 100

Duty finally assessed Rs. 70

According to Assessee correct duty payable Rs. 60 In this case, admitted amount of refund of Rs. 30 would be returned and if the Assessee seeks to claim Rs. 10 also (Rs. 70- Rs. 60) as refund, then Explanation II would apply and the said claim is to be preferred within six months from the date of adjustment of duty. This position is precisely dealt with and explained in the second portion of paragraph No. 104 of Judgment in case of Mafatlal Industries (supra)."

20. The two situations are relevant and important. In the first situation the assessee has paid provisional duty which gets reduced on final assessment. The assessee, therefore, becomes entitled to refund which is payable in terms of Rule 9B of the Excise Act, 1944 or Section 18 of the Act. For refund on this account, no application is required to be filed under Section 27 of the Act and therefore, sub-Section (2) is not applicable. In the second situation, the assessee becomes entitled to additional refund on account of appellate orders or orders passed by a court. In this situation, the assessee is under an obligation to file an application under Section 27 of the Act, the limitation period accordingly applies and doctrine of unjust enrichment is also applicable. Explanation II to Section 27 of the Act deals with the 3rd category of situations. Such situations may occur after the passing of the final assessment, on account of rectification under Section 154 of the Act or because of any other reason, as a result of which the final order suffers an amendment or a change and some amount becomes refundable. As far as Section 18 of the Act is concerned, when an amount becomes refundable after a final order is passed, the same has to be refunded immediately and for this purpose the assessee is not required to move an application under Section 27 and accordingly sub-section (2) to Section 27 would not apply. It is in this situation that the

legislature has intervened and has now inserted sub-sections (3), (4) and (5) to Section 18 w.e.f. 13.7.2006. These insertions obviously are not applicable to the case in hand as they do not have retrospective effect. It was so held in TVS Suzuki Ltd. (supra) when similar amendments were made in Rule 9B of the Rules passed under the Central Excise Act w.e.f. 25.6.1999. However, in 1999, the legislature did not make corresponding amendment in Section 18 of the Customs Act. These amendments were made w.e.f. 13.7.2006.

21. In view of the aforesaid position the question of law is answered in the affirmative and against the appellant and in favour of the respondent- assessee. The appeal is accordingly disposed of. No costs."

8. On a careful consideration of the above cited decision, we are in respectful agreement with the said proposition of law, in view of the fact that the entire case of claim for refund arose earlier to the amendment and the first situation envisaged in para-104 of the judgment of the Supreme Court in Mafatlal Industries case (supra) apply on all fours to the case on hand. Accordingly, substantial question of law Nos.1, 2 and 4 are answered in favour of the assessee and against the appellant/Revenue.

9. In view of the answer to substantial question of law Nos.1, 2 and 4, the issue as raised in substantial question of law No.3 is not required to be answered.

10. It is brought to the notice of this Court that this Court, vide order dated 19.3.08, passed in M.P. No.1 of 2008, while granting stay, has held that if the department/appellant is not able to succeed in the appeal, then the Department will be liable to pay statutory interest as per Section 27-A of the Customs Act. For better clarity, the said order is quoted hereunder :-

"There will be an order of interim stay as prayed for on condition if ultimately the Department/petitioner is not able to succeed in the appeal, they will have to pay the statutory interest as per Section 27-A of the Customs Act."

Accordingly, in view of the above order, the appellant/Revenue is bound to pay statutory interest as per Section 27-A of the Customs Act, as ordered by this Court, as quoted supra.

11. In the result, the appeal is dismissed with the abovesaid

direction. Consequently, connected miscellaneous petition is also dismissed. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

GLN

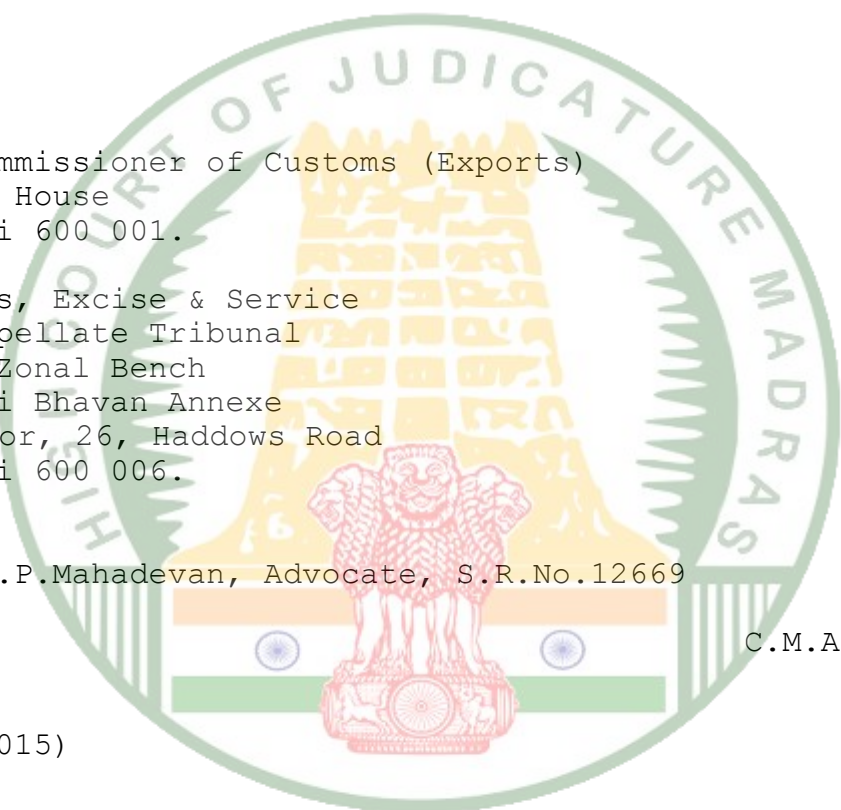
To

1. The Commissioner of Customs (Exports)
Custom House
Chennai 600 001.
2. Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Shastri Bhavan Annexe
1st Floor, 26, Haddows Road
Chennai 600 006.

+1cc to Mr.P.Mahadevan, Advocate, S.R.No.12669

C.M.A. NO.961 OF 2008

SSI (CO)
CA(25/03/2015)

The seal of the High Court of Madras is a circular emblem. It features a central yellow temple gopuram (tower) with a red lion capital in front of it. The lion capital is flanked by two white horses. The entire emblem is set against a green background with a white border. The words "HIGH COURT OF JUDICATURE MADRAS" are written in a circular path around the emblem. Below the emblem, the Sanskrit motto "सत्यमेव जयते" (Satyameva Jayate) is written in Devanagari script.

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