

Kota Oxygen Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-04-2000

Reported in : (2001)(130)ELT889TriDel

Appellant : Kota Oxygen

Respondent : Commissioner of Central Excise

Judgement :

1. The facts in this case are that the appellants paid a sum of Rs. 30,621.60 on 12-12-1985 in pursuance of the order passed by Assistant Commissioner of Central Excise Division, Kota vide Order-in-Original dated 8-11-1985. They, further paid a sum of Rs. 56,306.22 + Rs. 2,000/- on 3-3-1992 as duty and penalty respectively consequent to the Order-in-original dated 11-9-1991 passed by the same Assistant Commissioner Division, Kota.
2. The related proceedings finally settled in the CEGAT Final Order No.700/98-A, dated 4-5-1998 in which the demand of Rs. 30,621.60 was set aside. The second proceedings were settled by CEGAT Final Order No.3. In pursuance of the above Orders of CEGAT, the appellants filed refund claims of Rs. 30,621.60 on 3-6-1998 and another claim of Rs. 26,718.88 on 12-5-1998.
4. The appellants were issued a Show Cause Notice dated 20-7-1998 and 30-6-1998 in two cases calling upon them to show cause why the relevant claims made by them should not be rejected as time barred under Section 11B of Central Excise Act, 1944.

5. The Assistant Commissioner Central Excise, Kota in two separate orders both dated 18-8-1998 dropped the proceedings initiated against the appellants and sanctioned them the refund claims as per the particulars given above. The Assistant Commissioner in arriving at such conclusion relied on the decision of the Supreme Court in the case of Mafatlal Industries v. Union of India -1997 (89) E.L.T. 247 (S.C.) para 107 and decision of the Tribunal in M/s. Wflzir Steel Industries v. CCE -1997 (85) E.L.T. 45 (Tribunal).

6. The Department filed appeals before Commissioner (Appeals), Jaipur against the above stated orders of the Assistant Commissioner of Central Excise, Kota sanctioning the refunds to the party. The Commissioner (Appeals), Jaipur vide his common Order dated 7-12-1999 disposed of both the appeals of the Department. He observed in his order that reading of the Apex Court decision in the case of Mafatlal Industries, specially paras 83 and 107 makes it apparently clear that duty deposited by the party while pursuing the appellate remedy can itself not be considered as a duty paid under protest. Consequently, he held that the orders passed by the original authority were incorrect and held that the refund claims were hit by time bar under Section 11B and allowed the appeals of the department. The present appeal is against the aforesaid order-in-appeal passed by Commissioner (Appeals).

7. I have heard Shri Ramesh Singh, Advocate for the appellants and Shri Y.R. Kilania, JDR for the respondents. The Id. Advocate for the appellants apart from relying on the decision of the Apex Court in Mafatlal (supra) further placed reliance in the Tribunal decision in M/s. General Engineering Works v. CCE, Jaipur - 1999 (111) E.L.T. 86 (T). Shri Y.R. Kilania, JDR reiterated the findings of the lower appellate authority.

8. I have carefully considered the submissions made before me. It is observed that Commissioner (Appeals) has stated in his order that the judgment of the Hon'ble Supreme Court in the case of Mafatlal Industries specially paras 83 and 107 make it clear that duty deposited by the party by pursuing the appellate remedy can itself not be considered as duty paid under protest. The Id. lower appellate authority has not given any analysis or reasons for arriving at such conclusion. This view

appears entirely contrary to the view taken in that judgment. In support para 107 of the judgment is extracted below : "It is, therefore, clear that in respect of such decrees and orders, the procedure and conditions prescribed in Section 11B will have to be complied with. However, under the scheme of the amended Excise Act, the application for refund which is a pre-requisite for invoking section 11B(2), is required to be made within six months from the payment of duty. It is obvious that this requirement can not be complied with the respect of pending decrees and orders. But it must at the same time be realised that in such a case, the assessee was protesting against the recovery of the excise duty from him for which he had even initiated legal proceedings. It would, therefore be in order to assume that he had paid the duty even though he was protesting its recovery. To ensure that such orders and decrees are not frustrated, it must be deemed that duties of excise in such cases were paid "under protest" within the meaning of the second proviso to Clause (1) to section 11B(2), thereby complying with the scheme to the amended Excise Act." 9. Further, the Tribunal in the case of General Engineering Works (supra), in a similar case wherein the Assistant Collector had dis-allowed abatement on inspection charges claimed by the party in determining the assessable value against which the party filed an appeal. The matter went up to the Tribunal and the appeal of the party was allowed. In pursuance of the order of the Tribunal the party filed refund claim which was rejected by the Assistant Collector on the ground that the claim was not lodged within six months as stipulated under Section 11B. In this decision the Tribunal upheld the submissions of the appellants that since the matter was pending before the appellate forum and in pursuance of that order the party had filed refund claim, hence time limit under Section 11B is not applicable.

10. In view of the above, the order passed by the lower appellate authority is not sustainable and the same is set aside. In this context it would not be out of place to observe that originally the impugned refund claims were sanctioned to the party by the Assistant Commissioner against which the department filed appeals before Commissioner (Appeals). In the course of entire proceedings of this matter, the department at no stage has advanced the plea of 'Unjust enrichment'. Therefore, this point does not appear relevant to the proceedings calling for recording any findings on it.

