

Commissioner of Central Excise, Vs. Govind Rubber

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-21-2000

Reported in : (2001)(137)ELT701TriDel

Appellant : Commissioner of Central Excise,

Respondent : Govind Rubber

Judgement :

1. This appeal has been filed by the Revenue against the Order-in-appeal dated 17.12.99 passed by the Commissioner (Appeals) vide which he had reversed the Order-in-original dated 17/18.8.99 of the Deputy Commissioner who held the claim of the respondents for the refund of duty and penalty amount as time barred.

2. The fact giving rise to this appeal, may briefly be stated are as under: 3. The respondents are engaged in the manufacture of tyres and tubes. A demand of Rs.3,94,000/- was confirmed against them by the Assistant Commissioner, besides the imposition of penalty of Rs.5,000/-, vide order-in-original dated 17.3.97 for having availed the modvat credit illegally. However, in appeal against that order by the respondents, the Commissioner (Appeals) allowed them credit of Rs.2,97,350/- and disallowed credit of only Rs.96,650/- and also reduced the penalty amount of Rs.5,000/- to Rs.4000/- vide order dated 31.3.98. The respondents deposited Rs.96,650/- vide debit entry No. 55 dated 16.4.98 in RG A Part II. They also deposited penalty amount of Rs.4,000/- vide TR 6 dated 18.4.98. They however subsequently challenged the order of the Commissioner (Appeals) before the Tribunal and the Tribunal accepted their appeal and reversed the order

of the Commissioner (Appeals) vide final order dated 18.12.98. Consequently, the respondents filed claim for refund of Rs.1,00,650/- which included the penalty amount of Rs.4,000/- on 9.2.99. The Deputy Commissioner who adjudicated the refund claim, held the same to be time barred for having not filed within six months from the date of payment vide order in original dated 17/18.9.99. The respondents challenged this order of the Deputy Commissioner, before the Commissioner (Appeals) who reversed the same by holding that the respondents were entitled to credit back the modvat amount of Rs.96,650/- in RG 23 A Part II and refund of penalty amount of Rs.4,000/- in terms of order of the Tribunal dated 18.12.98.

3. The Revenue has come in appeal before the Tribunal against the above said Order-in-appeal of the Commissioner (Appeals).

4. I have heard Shri S.C.Pushkaran, JDR for the revenue and Shri C.D.Banga, advocate for the respondents.

5. The main ground on which the Revenue has contested the validity of the impugned order in appeal is that the refund claim of the respondents was required to be considered only under Section 11 B of the Act as per ratio of law laid down by the Apex Court in Mafatlal Industries vs. Union of India reported in 1997 (89) ELT 247 (SC) but the Commissioner (Appeals) had failed to do so. It has been mentioned in grounds of appeal that as per provisions of Section 11 B of the Act, refund claim was required to be filed within six months from the date of payment and that this period of limitation was not applicable only in those cases where the duty was paid by the assessee 'under protest' or under the order of the Court/Tribunal. The Revenue has reproduced paras 83 and 85 of the judgement of the Apex Court in Mafatlal Industries case (supra) in the grounds of appeal. Those paras read a under: 83. Where a person proposes to contest his duty liability by way of appeal revision or in the higher Court, he would naturally pay the duty, whenever he does, under protest".

85. "Any person paying the duty, under protest has to follow the procedure prescribed by Rule, i.e. Rule 233 B ibid, and once he does so, it shall be taken that he has paid the duty under protest".

6. But keeping in view the facts and circumstances of the case in hand, which are not much in dispute, the ratio of the law laid down by the Apex Court in Mafatlal Industries case relied upon by the Revenue, is of no help to them. Admittedly, the respondents initially availed modvat credit of Rs.3,94,000/-, but the same was disallowed to them by the Asstt Commissioner vide order dated 17.3.97 and even penalty of Rs.5,000/- was also imposed on them on the ground that they took the modvat credit illegally. That order of the Asstt Commissioner was modified in appeal by the Commissioner (Appeals) who disallowed modvat credit of only Rs.96,650/- and allowed of the balance amount of Rs.2,97,350/- and also reduced the penalty amount of Rs.5,000/- to Rs.4,000/-. The respondents, complied with that order of the Commissioner (Appeals) by making debit entry of Rs.96,650/- in the RG 23 A Part II vide debit entry No. 55 dated 16.4.98 and also deposited the penalty amount. But they did not accept that order of the Commissioner (Appeals), rather challenged the same before the Tribunal by filing the appeal. It also remains undisputed that the Tribunal vide Final Order dated 18.12.98 allowed the appeal of the respondents in toto by reversing the order of the Commissioner (Appeals). Therefore keeping in view all these facts, the debit entry of Rs.96,650/- and deposit of the penalty amount of Rs.4,000/- by the respondents was not voluntary but under the order of the Commissioner (Appeals), before whom they challenged the order of the Asstt Commissioner. They even did not accept the order of the Commissioner (Appeals) and challenged the same before the Tribunal. On acceptance of the appeal by the Tribunal on 18.12.98 the respondents became legally entitled to credit back the amount of Rs.96,650/- in the RG 23 A Part II wherein they made the debit entry not voluntarily, but under the order of the Commissioner (Appeals). They also became entitled to the refund of penalty amount of Rs.4000/- as the same was deposited by them under the orders of the Commissioner (Appeals).

7. The plea of the Revenue that while making a debit entry and depositing the penalty amount the respondents were required to lodge the protest in terms of Rule 233 (B) of the Rules and for having not done so, the payment could not be said to have been made by them under protest and as such period of six months prescribed by Section 11B of the Act for claiming the refund of the duty from the date of payment, was applicable, cannot be at all accepted. The apex Court in

Mafatlal Industries case (supra) on which reliance has been placed by the Revenue, in para 86 of the judgement had observed as under:- We may clarify at this stage that when the duty is paid under the orders of Court (whether by way of an order granting stay, suspension, injunction or otherwise) pending on appeal/reference/writ petition, it will certainly be a payment under protest; in such as case, it is obvious, it would not be necessary to lodge the protest as provided by Rule 233 B." 7. Even the observations made by the Apex Court in para 83 of the judgement which had been referred by the Revenue in the grounds of appeal and reproduced above also help the respondents in this case. In that para also, it had been observed that "where the person propose to contest its duty liability by way of appeal or revision or in the higher court, he would naturally pay the duty whenever he does under protest".

Therefore, keeping in view the above observations of the Apex Court in paras 83 and 86 of the judgment in Mafatlal Industries case (supra) it can be concluded without any hesitation that the debit entry of Rs.96,650/- in the RG 23 A Part II was made and penalty amount of Rs.4000/- was deposited by the respondents, under protest under the order of Commissioner (Appeals) as they proposed to contest the order of the Commissioner (Appeals) under which they were required to make the debit entry and pay the penalty amount in question. Therefore, the bar of limitation under 11 B of the Act could not be invoked against them when they filed their claim for refund of modvat and penalty amount, they applied for the refund on 9.2.99 within less than two months of passing of order by Tribunal on 18.12.99. Therefore the impugned order of the Commissioner (Appeals) holding their claim not to be time barred, cannot be in any manner said to be bad in law. His order is rather perfectly valid and in consonance with the law laid down by the Apex Court in Mafatlal Industries case (supra).

Consequently, there is no merit in the appeal of the Revenue and the same is dismissed.

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