

**Meghdev Enterprises Vs. Commissioner of Cus. and C. Ex.,**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Feb-22-2002

**Reported in :** (2002)LC881Tri(Mum.)bai

**Judge :** G Srinivasan

**Appellant :** Meghdev Enterprises

**Respondent :** Commissioner of Cus. and C. Ex.,

**Judgement :**

1. This appeal has come up for hearing before me on the question of refund. The appellant mixes phenol formaldehyde and melamine formaldehyde to produce resins which fell under item 15A(1) of the then existing Schedule I to the Central Excise Act. The question involved is whether the mixing of phenol formaldehyde and melamine formaldehyde would amount to manufacture and the resultant product is marketable or not. The said issue was decided in favour of the appellants as reflected in the judgment of the Supreme Court in the case of Moti Laminates Pvt. Ltd. etc. v. CCE, Civil Appeal No. 80 of 1988 [1995 (76) E.L.T. 241 (S.C.)]. When the matter was disposed of Rs. 63,201.60 was paid by the appellant before me to the department. It should be mentioned here that the amount was paid by an adjustment from the refund claim of the appellant pending before the adjudicating authorities. The question before me is that after the disposal of the case by the Supreme Court by its order dated 14-2-1995, the refund claim was dismissed by the lower authorities on the ground that the amount was paid without any protest. The question involved is whether the time limit provided under Section

11B of the Central Excise Act will be applicable or not. The six months time limit provided in Section 11B will not be applicable in my view because the reason under which the amount was demanded and paid namely the Tribunal's order was itself challenged in appeal. Therefore the question of separate letter written by the appellant protesting against the payment may not arise.

2. Such type of protest has come for consideration of the Tribunal in the case of CCE v. Enzo Chem, Laboratories P. Ltd. [1996 (83) E.L.T.434] wherein the Paragraph 5 of the Tribunal has held as follows :- "5. After hearing both the sides, we are unable to agree with the contention raised by Shri K.M. Mondal, the Id. SDR. Any demand confirmed by the lower adjudicating authority, if challenged by way of appeal, as provided under the law, the appeal itself could be construed to be a protest against demand. Moreover, as per the statutory requirements, if the amount is required to be deposited, so that the appeal could be heard on merits, that payment cannot be construed to be a voluntary payment and has to be construed only as a payment for fulfilling the statutory obligations. When the assessee succeeds in the appeal and the amount paid in fulfilling the statutory requirements under Section 35F of the Act becomes refundable to them, the question of bringing in the time limit prescribed under Section 11B or insisting on a separate letter of protest before payment, does not arise. We therefore see no merit in the appeal. Hence we dismiss the appeal and the stay application may also be treated as disposed of accordingly." 3. Another judgment is of Utkal Moulders v. CCE - 1999 (111) E.L.T. 562 (T), wherein the Supreme Court's order in Mafatlal Industries Ltd. v.U.O.I. - 1997 (89) E.L.T. 247 (S.C.), Para 86 has been extracted. I quote Paragraph 1.1 of the order in Utkal Moulders case as below :- "1.1 ...We observe that this point stands decided by the Apex Court in its judgment in the case of Mafatlal Industries Limited & Others v. Union of India reported in 1997 (89) E.L.T. 247 (S.C.) = 1997 (17) RLT 906 (S.C. Larger Bench). In this connection, we reproduce Para 86 of the said report, which is as follows : '86. We may clarify at this stage that when the duty is paid under the orders of the Court (whether by way of an order granting stay, suspension, injunction or otherwise) pending an appeal/reference/ Writ Petition, it will certainly be a payment under protest; in such a case it is obvious that it should not be necessary to lodge the protest as provided by Rule 233B.' 4. From the reading of both the judgments of

the Tribunal, it will be clear that when the very question has been challenged before the Supreme Court, the question of filing a separate letter of protest will be an exercise in futility. The spirit of Rule 233B of the Central Excise Rules has been complied when the appellants have agitated the matter before the Supreme Court. This is what the judgment of the Supreme Court held in Mafatlal Industries case supra.

5. I therefore set aside the impugned order and allow the appeal.

Whether unjust enrichment is applicable or not is not the matter before me. Therefore I give no opinion on that.

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