

Jyoti Structures Ltd. Vs. Commissioner of Cus. and C. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-08-2003

Reported in : (2003)(90)ECC214

Judge : S T Gowri, G Srinivasan

Appellant : Jyoti Structures Ltd.

Respondent : Commissioner of Cus. and C. Ex.

Advocate for Pet/Ap. : Mr. Mayur Shroff

Judgement :

1.The question for consideration in this appeal is whether in order for the appellant to obtain refund of duty paid by it in excess, it is required to establish as provided in Sub-section (2) of Section 11B of the Act that incidence of duty which is available as refund has not been passed to any other person. The refund arose in the following manner. The appellant had filed on 19-3-1995 a classification list in which it claimed total exemption from duty available in notification 57/95 to parts of windmills (manufactured). Before the classification list was approved, the appellant received a letter from the Superintendent asking it to pay duty on the goods at 15% ad valorem until the classification is approved finally. While finally approving the classification, the Assistant Commissioner, on 26-4-1995 accepted the entitlement to the exemption. The appellant thereupon filed the claim of refund of the duty paid by it on the goods cleared by it between 19-3-1995 and 11-4-1995. While the Assistant Commissioner accepted that duty had been paid in excess, he

declined to pay the refund to the appellant on the ground that it had not been shown that the incidence of duty had not been passed on. This order was confirmed by the Commissioner (Appeals).

2. Counsel for the appellant contends that the clearance of the goods made by it between the filing of the classification list and its final approval was provisional in nature and the refund had therefore arisen as a result of finalisation of such provisional assessment. The requirement contained in Section 11B(2) does not apply to refund arising as a result of finalisation of provisional assessment. He has cited the judgment of the Supreme Court in *Samrat International (P) Ltd. v. CCE - 1992 (58) E.L.T. 561* which has been relied upon by the Tribunal in *CCE v. Mehra Ferro Alloys - 2001 (137) E.L.T. 1420*. He also relies upon the judgment of the Supreme Court in *Serai Kella Glass Works Pvt. Ltd, v. CCE -1997 (91) E.L.T. 497*. The departmental representative contends that the later judgment of the Supreme Court in *Metal Forgings v. UOI - 2002 (146) E.L.T. 241* has clearly laid down that there cannot be any provisional assessment under Rule 9B unless a specific order under that rule is passed and that goods were cleared on such provisional basis. Therefore he contends that the assessment was not provisional and the refund has not arisen as a result of the finalisation of the assessment in terms of Rule 9B(5).

3. In *Samrat International*, the question before the court was whether the claim for refund filed on 30-10-1985 of the duty paid by the manufacturer between 26-3-1985, the date of filing of the classification list and 3-6-1985 when that list was approved was partly barred by limitation. The finding of the Assistant Collector that the claim for the period from 1-4-1985 to 27-4-1985 was barred by limitation was confirmed by the Commissioner (Appeals) and the Tribunal, The Supreme Court found that the duty paid by the assessee between the date of filing of the classification and its final approval "was obviously provisional subject to the result of the final approval of the officer concerned." It noted that this is the procedure prescribed in Rule 9B except that no bond was required in a case in the account before it. Therefore it concluded that the provisions of Clause (e) of paragraph B of the explanation under Section 11B, which related to provisional assessment, would apply and the date of final assessment will be 8-5-1985 that is when the RT

12 return was finally assessed. In its later judgment in Coastal Gases & Chemicals Pvt. Ltd. v. CCE, Vishakhapatnam - 1997 (92) E.L.T. 460, the Supreme Court was concerned whether a claim for refund filed by the assessee on 4-1-1980 in respect of duty paid by it between 1-4-1978 and 25-7-1978 was barred by limitation. Classification list had been filed on 23-3-1978 and finally approved on 1-4-1978. The assessee relied upon Samrat International judgment in order to say that payment of duty was provisional and therefore refund claim was not barred by limitation. The court however declined to accept this contention, holding that Samrat International judgment was on the fact of that case and that it had not been shown any material to indicate before it that the goods had been cleared by the assessee following the procedure laid down in Rule 9B or that the payment was provisional. It said that the appellant had not succeeded in establishing that the payment of duty was provisional. No doubt, the six Member Bench of the Tribunal in Rajeev Mardia v. CCE - 2001 (129) E.L.T. 334 has interpreted Samrat International to say that the judgment "envisages payment of duty on provisional basis pending decision of the classification list or price list. For these payments to be treated as provisional, procedure contemplated by Rule 9B is not to be followed." However, subsequent to this decision of the Larger Bench, the Supreme Court in Metal Forging v. UOI - 2002 (146) E.L.T.241, after considering both Coastal Gases and Samrat International had said, "It is clear that to establish that clearances were made on a provisional basis, there should be first of all an order under Rule 9B of the Rules and that to show that the goods were cleared on the basis of the said provisional basis, and payment of duty was also made on the basis of the said provisional classification. These facts in the instant case are missing, therefore, in our opinion, there is no material in the instant case to establish the fact that either there was a provisional classification or there was an order under Rule 9B empowering the clearance on the basis of such provisional classification." This emphatic statement of law - that judgment of the Supreme Court, in our view, does not result in the appellant being able to claim the benefit of the ratio of Samrat International. Counsel for the appellant further relies upon the judgment of the Supreme Court in Hindustan Metal Pressing Works v. CCE 4. In Paragraph 9 of this reported judgment in Hindustan Metal Pressing Works, the Supreme Court noted that, relying upon the judgment of that court in Mafatlal

Industries Ltd. v. UOI - 1997 (89) E.L.T. 247 (S.C.) = (1997) 5 SCC 536, "in a similar matter, the Court in Sinkhai Synthetics & Chemicals (P) Ltd. v. CCE, Aurangabad - 2002 (143) E.L.T.17 (S.C.) = (2002) 9 SCC 416 allowed the appeal and rejected the contention of the Revenue that the excise duty paid under protest also would be covered by the provisions of Section 11B." The departmental representative contends that the Supreme Court in Sinkhai Synthetics & Chemicals (P) Ltd. has in fact concluded that cases of payment of duty under protest will not be covered by Sub-section (2) of Section 11B. He relies on Paragraph 95 of the judgment in Mafatlal Industries, which held that the refund arising as a question of finalisation of provisional assessment under Rule 9B would not be governed by Sub-section (2) of Section 11B. He points to the paragraph of the court's order in which this paragraph is reproduced followed by the statement that counsel for the revenue does not dispute that the decision in Mafatlal Industries governs the appeal. He further points out that in Mafatlal Industries, the Supreme Court has never said that cases of payment of duty under protest would not be governed by Sub-section (2) of Section 11B and that there is nothing in that judgment which could justify such an inference.

5. Whatever our views in the matter, we are required to follow the judgment of the court in Hindustan Metal Pressing Works when it interprets the earlier judgment in Sinkhai Synthetics & Chemicals (P) Ltd. At the same time, the departmental representative brings to our notice the judgment of the Supreme Court in Collector v. Citurgia Biochemicals Ltd. -1998 (101) E.L.T. 568. In this judgment, the two judge bench of the Supreme Court confirmed the view of the Tribunal impugned in the appeal before it that the payment of duty by the assessee for part of the period in question was under protest, hence not barred by limitation. It said, "the claim shall be dealt with in accordance with law declared in Mafatlal Industries." For another part of the period too, it said, "if the payment was determined to have been paid under protest, it shall be governed by the law in Mafatlal Industries read with Clause (6) of the format order. We are not able to find anything in the judgment of the court in Mafatlal Industries from which it can be concluded that where duty is paid under protest, the principles contained in Section 11B(2) will not apply nor Mr. Mayur Shroff, learned Counsel for the appellant is able to show anything in that judgment, to this effect. The majority in the order reported in the

Excise Law Times, in Paragraph 95, provided that if refund of duty arises as a result of finalisation of provisional assessment, the provisions of Section 11B(2) will not apply. It went on to say in Paragraph 96 that "claim for refund under Rule 9B and 11B constitute an independent regimen" and said, "Section 11B of the Central Excises and Salt Act and Section 27 of the Contract Act (apparently a typographical error for Customs Act), whether before or after 1991 amendment - as interpreted by us herein - make every refund claim subject to proof of not passing on the burden of duty to others." Paragraph 99(iii) summarises its conclusion. It went on to categorise claims for refund in two broad categories, one was there was wrong payment of duty by misinterpretation of the law and where there was excess payment of duty. It then went on to say that a claim for refund whether made in any other situations can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. In addition, the majority court held extensively as that produced in Paragraphs 83 and 84 in relation to the contentions raised by the counsel before it as to payment of duty under protest. If the court had intended to say that duty paid under protest would not be subject to the provisions of Section 11B(2), there was no requirement for it to go into an exhaustive discussion of the aspects.

6. We are therefore of the view that it is clear that the constitution bench which decided in *Mafatlal Industries Ltd.* specifically laid down that even in the case of duty paid under protest, the requirement under Sub-section (2) of Section 11B will apply. Respectfully, following this judgment, we are unable to accept the contention of the appellant to the contrary.

7. The last contention of the counsel for the appellant is that the fact that the price of the goods rests upon the contract between it and the two buyers. Clause 6 of the terms of the purchase order provides that "the price was accepted as firm and should be kept firm throughout the contract period. No price variation will be accepted," The contract between the appellant and another purchaser, *Aban Loyd Chiles Offshore Ltd.*, also provides that the prices are inclusive of taxes. Therefore, he contends that incidence of duty had not been passed on.

8. We are not able to accept this submission. The fact that the price of the goods remain the same, when different rates of duty are paid on it, does not lead to the inevitable conclusion that incidence of duty has not been passed on to the buyer. It is possible that the uniformity in price may be due to various other factors. He may have reduced or done away the profit or have been carrying the loss. This is in fact the Supreme Court in Mafatlal Industries Ltd, in paragraph 91 when it says, "Similarly, no one will ordinarily pass on less excise duty than what is exigible and payable. A manufacturer may dip into his profits but would not further dip into the excise duty component. He will do so only in the case of a distress sale. Again, just because duty is not separately shown in the invoice price, it does not follow that the manufacturer is not passing on the duty. Nor does it follow therefrom that the manufacturer is absorbing the duty himself." This decision has been applied by the Tribunal in its decision in CCE v. Christine Hoden (I) Pvt. Ltd. (Order No. C-II/144/WZB/2003, dated 91-2003 [2003 (155) E.L.T. 271 (Tri. -Mumbai)]).

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