

**Commissioner of Central Excise Vs. Welding Rods Pvt. Ltd.**

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

**Decided On :** Dec-08-2003

**Reported in :** (2004)(166)ELT86Tri(Mum.)bai

**Judge :** S T Gowri

**Appellant :** Commissioner of Central Excise

**Respondent :** Welding Rods Pvt. Ltd.

**Judgement :**

1. Consequent upon an order of the Commissioner (Appeals), holding that the assessee was entitled to deduct the cost of transportation from the sale price of the welding electrodes manufactured by it to arrive at their assessable value, it filed a claim for refund of the duty paid by it in this regard. The Assistant Collector dismissed the claim on the ground that the evidence, as specified by the Commissioner (Appeals), of actual payment of duty had not been produced by the claimant. The assessee approached the Gujarat High Court, which passed an order on 26-7-1991 directing the Assistant Collector to decide whether or not refund should be granted in accordance with law. The Assistant Collector thereafter sanctioned the refund in September 1991. The notice issued to the assessee in March 1992 proposed recovery of the refund on the ground that the requirement contained in Sub-section (2) of Section 11B of the Act, that the incidence of duty should not have been transferred to any person was not shown to have been complied with. The Assistant Collector passed orders for recovery of the refund on the ground that the requirement contained in Sub-section (2) of

Section 11B of the Act had not been complied with. The assessee appealed this order, The Commissioner (Appeals) held that, since the amount had been sanctioned before the enactment of the amended Section 11B, there was no authority in law for recovery of this amount by applying Sub-section 2 of Section 11B of the Act. This is questioned in this appeal by the Department.

2. I have heard the Departmental representative. The respondent is absent and unrepresented despite the notice.

3. The ground in the appeal is that although the refund was paid on 10-9-1991, notice was issued on 16-9-1992 for the amount erroneously refunded. Therefore, the refund claim was still pending when Section 11B was amended on 29-9-1991. The Supreme Court's judgment in Union of India v. Jain Spinners Ltd., 4. It will be clear from the above narration that the order for refund was passed on 10-9-1991. The assessee subsequently took credit of the amount refunded in its modvat account. While the date of taking credit is not known, it is not the contention in the appeal that it was taken after 20-9-1991. A constitution bench of the Supreme Court considered in its judgment in Mafatlal Industries v. Union of India, 1997 (89) ELT 247 the retrospective application of Section 11B. It said that the provisions of amended Section 11B apply to all proceedings where the refund has been made finally or unconditionally and where the refund proceedings had been finally terminated, in the sense that the period for filing the appeal against the order of refund has also expired before September 1991, they could not be reopened. In this case, however, the notice issued under Section 11A for recovery of refund was issued on 6-3-1992, within the period provided in Section 11A of six months from the payment of the refund. Therefore, applying the ratio of the judgment of Supreme Court, it will follow that the refund proceedings had not finally terminated. The Assistant Commissioner was therefore right in applying the provisions of Sub-section (2) of Section 11B of the Act. It is not contended before me by the assessee that incidence of duty has not in fact been passed on. Therefore the denial to it of the refund by the Assistant Commissioner is correct.

Hence the order of the Assistant Commissioner directing recovery from the assessee of the amount refunded and ordering its deposit in the Consumer

Welfare Fund is correct.

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