

Indian Coffee and Tea Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-12-2004

Reported in : (2004)(93)ECC624

Judge : K Usha, N T C.N.B.

Appellant : Indian Coffee and Tea

Respondent : Cce

Judgement :

1. The appeal at the instance of the assessee arises out of the proceeding relating to its claim for refund of the duty paid under protest.
2. The appellants purchase, duty paid plastic films and thereafter metallise and/or lacquer the duty paid plastic films. Prior to introduction of the Central Excise and Tariff Act, 1985, the metallised/Lacquered plastic films made by the appellants were completely exempt from excise duty vide Notification No. 231/92 dated 27.10.92. The above notification was withdrawn w.e.f. 1.3.96. The metallised/lacquered plastic film was classifiable under Heading 39.20 under CETA, 1985. Since there was some lack of clarity regarding durability of the goods, clearance of the same was stopped from 1.3.86.
3. The appellant filed classification list under Rule 173B on 1.4.86 claiming that no duty is payable on its goods for the reason that the process did not amount to manufacture and that the input and output were classifiable under same heading

and no duty hence was payable. On 15.4.86, the appellant informed the department that clearances have been stopped pending approval of classification list dated 1.4.86. It then filed classification list for payment of duty under protest. The show cause notice dated 17/21st April 1986 was received directing the appellant to show cause why the classification filed on 1.4.86 should not be disapproved. On 2.5.86, price list was filed under Rule 173C indicating that duty was being paid under protest. Appellant started clearance of the goods on payment of duty under protest from 8.5.86. By order dated 26/27th, August, 1986 the Assistant Collector approved the classification list dated 1.4.86 holding that the process of metallising/lacquering amounted to manufacture. However, since the input and output were classifiable under same sub-heading, no duty was payable on the goods cleared by the appellant.

4. On 8,9.86 appellant-filed price list under Rule 173C claiming that no duty is payable in view of the Order-in-Original dated 26/27th August 1986. From 9.9.86 onwards, it started clearing goods without payment of duty. On the basis of oral instructions from the department insisting on payment of duty started clearing the goods on payment of duty under protest on 14.11,86. Thereafter, the appellant received letters from the department insisting on clearing the goods on payment of duty. On 25.11.86 the Assistant Collector issued show cause notice under Section 11A proposing to demand duty on clearances made during the period May 1986 to October 1986 for the reason that metallising/lacquering amounted to manufacture. Commissioner (Appeals) confirmed the order on 20.4.90. The appellant took up the matter before the Tribunal and by order dated 10.10.96 the Tribunal took the view that the process would not amount to manufacture. On 18.3.98 the appellant filed refund claim for the period from 8.5.86 to 31.3.88.

5. Show cause notice dated 13.8.98 was issued proposing to deny the refund claim. By order dated 25.11.98 the Assistant Commissioner rejected the claim on the ground of unjust enrichment. Commissioner (Appeals) by order dated 31.3.2003 confirmed the above order.

6. It is contended on behalf of the appellant that since duty has been paid under protest, the claim for refund is not hit by the principle of unjust enrichment. In

support of the above contention reliance was placed by the appellant on the decisions of the Supreme Court in Sinkhai Synthetics & Chemicals Ltd. v. CCE, 2002 (83) ECC 5 (SC) : 2002 (143) ELT 17 (SC) and Hindustan Metal Pressing Works v. CCE, 2003 (86) ECC 1 (SC) : 2003 (153) ELT 11 (SC). Reliance was also placed on the decisions of the Tribunal in Tecil Chemicals v. CCE, 2003 (151) ELT 136 (T) and Birla Corporation Ltd. v. CCE, 2003 (54) RUT 510 (T). Without prejudice to the above contention, the appellant submits that from the period 10.9.86 to 13.11.86 the appellant had not paid any duty at the time of clearance. The duty for the above period was paid under protest in lump sum subsequent to the clearance. Under these circumstances, there is no question of applying the principle of unjust enrichment for this period.

7. The learned DR would submit that the claim put forward by the appellant is against the ratio of the decision of the Supreme Court in Mafatlal Industries v. UOI, 2002 (83) ECC 85 (SC) : 1997 (89) ELT 247.

Reliance was placed on the following two decisions of the Hon'ble Supreme Court: National Winder v. CCE Allahabad, 2003 (88) ECC 2 (SC) : 2003 (154) ELT 350 (SC) Bombay Tyres International Ltd. v. CCE, Indore, 2000 (72) 471 (SC) : 2000 (121) ELT 8 (SC) In National Winder v. CCE, Allahabad a two Member Bench of the Hon'ble Supreme Court after holding that the period of limitation of six months will not apply even to a claim for refund by the purchaser, if duty was paid by a manufacturer on protest held that the purchaser has to satisfy the department regarding unjust enrichment before any refund can be made to him. We do not find the specific issue with which we are concerned was considered in the above judgment. The same is the case of another decision relied on by the learned DR, namely, Collector of Customs & Central Excise, Meerut v. Citurgia Biochemicals Ltd., 1998 (101) ELT 568 (SC). The order passed in Bombay Tyres International Ltd. is an order holding that the appellant has not produced any material to indicate that the burden of tax was not passed on to the consumers and, therefore, they are not entitled to claim the refund of the tax which was paid under protest.

8. Sinkhai Synthetics & Chemicals Pvt. Ltd. is a later decision of the Hon'ble Supreme Court rendered by a Bench of three Judges. The facts in the above case as noted in the decision is as follows: "The assessee claimed the benefit of an exemption notification. The Revenue challenged the claim. The matters went higher and upto the Customs, Excise and Gold (Control) Appellate Tribunal which decided in favour of the assessee in the interregnum, the assessee paid the excise duty under protest. Upon the appeals before the Tribunal being decided in their favour, on 17th January, 1991, the assessee claimed repayment of the amount of duty paid by them under protest." On 3rd July the assessee was served with notice which asked to show cause why the amounts of excise duty paid by them under protest should not be retained with the Revenue in accordance with the provisions of Section 11B, as amended. The matter went up to the Tribunal and the Tribunal upheld the contention of the Revenue. The Hon'ble Supreme Court after referring to paragraph 95 of the judgment in Mafatlal Industries v. UOI took view that the ratio of the above decision is in favour of the contention raised by the assessee and the assessee's appeal was allowed. The two decisions of the Tribunal relied on by the appellant had followed the ratio of the decision in Sinkhai Synthetics & Chemicals Pvt. Ltd. and took the view that when duty was paid under protest, the principle of unjust enrichment would not apply. CCE v. Allied Photographs India Ltd. has been brought to our notice. This judgment is rendered by a two Member Bench. In this case, the issue whether the claim for refund can be allowed without taking into consideration the doctrine of unjust enrichment after final assessment came up for direct consideration. Doubting the correctness of the decision of the three Member Bench in Sinkhai Synthetics & Chemical Pvt. Ltd. in the matter of interpreting the ratio of the decision of Mafatlal Industries, the learned Judges referred the matter for consideration by a Larger Bench.

In the light of the above, it is contended on behalf of the Revenue that Sinkhai Synthetics & Chemicals Pvt. Ltd. is no longer good and, therefore, it is not to be followed by this Tribunal.

10. We are not able to accept the above contention raised by the learned DR. It is to be noted that the two Member Bench even though felt that the understanding of the three Member Bench in Sinkhai Synthetics & Chemicals Pvt. Ltd. of the ratio of

Mafatlal Industries was not correct, the Bench did not proceed to decide the issue on its own. Judicial discipline demanded reference to a Larger Bench. Such being the position, so long as Sinkhai Synthetics & Chemicals Pvt. Ltd. is not reversed by a Larger Bench it is binding on this Tribunal. It is not for this Tribunal to hold that Sinkhai Synthetics & Chemicals Pvt.

Ltd. was not decided correctly by the three Member Bench of the Hon'ble Supreme Court in the light of the ratio of Mafatlal Industries. We, therefore, follow Sinkhai Synthetics & Chemicals Pvt. Ltd. and hold that the appellant is entitled to refund without reference to the doctrine of unjust enrichment. The order impugned is set and the appeal stands allowed.

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