

Dcm Data Systems Ltd. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-21-2006

Judge : R Abichandani

Appellant : Dcm Data Systems Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. This appeal has been preferred against the order of the Commissioner (Appeals) made on 6.10.2004, setting aside the order-in-original dated 17.5.2004 and directing the adjudicating authority to first finalize the provisional assessment in accordance with the earlier directions given on 22.5.2001 by the Appellate Commissioner and then to decide the fate of refundable amount in terms of the provisions of Sub-section (2) of Section 11B of the Central Excise Act, 1944 and the proviso attached thereto. The appeal is directed mainly against the direction of the Commissioner (Appeals) to decide the fate of refundable claim in terms of the provisions of Sub-section (2) and the proviso attached thereto, on the ground that the said provision was inapplicable where provisional assessment was finalized under Rule 9B.2. The appellant was engaged in the manufacture of electronic goods (computers and parts thereof) and on 11.3.2003, it filed a refund claim of Rs. 5,84,606/-. Earlier, it had filed eight refund claims between 30.9.1992 and 29.6.1994 for an amount of Rs. 85,84, 474/- seeking deductions in respect of post manufacturing expenses under various heads which is said to be including the aforesaid amount of Rs. 5,85,606/-. The Assistant Commissioner by order dated

2.6.1996 rejected those claims for deductions and found the assessee liable to pay a sum of Rs. 1,44,417/- while finalizing the provisional assessment. In paragraph 20 of that order, it was held that: "...on finalization of party's assessment, it is found that the party has paid C.E. duty amounting to Rs. 1,44,417/- short for the years 92-93 and 93-94 for which period the party had filed the refunds claim for their safety/precautionary measures". In the appeal, preferred against that order by the assessee, the Commissioner (Appeals) on 22.5.2001, set aside a part of the order pertaining to the rejection of the claim for deductions of "installation and training charges" from the assessable value and the adjudicating authority was directed to finalize the assessment on that basis. Thereafter, the appellant approached the concerned officer on 7.2.2002 submitting details of installation and training charges and asked for refund. The appellant was, however, required to furnish complete set of documents alongwith the refund claim in a proper format by letters dated 7.2.2003 and 7.3.2003.

Thereupon, the appellant preferred a fresh claim on 10.3.2003 in respect of 5,84,605/- with the Assistant Commissioner. However, since the claim in proper format was not submitted and on being asked to furnish supporting duty paying documents, the party took the stand in their communication dated 9.6.2003 that their record was destroyed in a fire accident that took place in the factory on 2.2.1996, the Assistant Commissioner on the basis of the material on record held that since the party failed to comply with the requirements of preferring the refund claim in proper format with original duty paying documents, the party was not eligible for refund on merits. This order was appealed against before the Appellate Commissioner and the Appellate Commissioner by the impugned order dated 6.10.2004, observing that the earlier order-in-appeal remained un-complied with and that insistence on fresh refund claim in proper format was uncalled for, set aside the order with a direction to finalize the matter and decide whether the refund should be issued in terms of the provisions of Sub-section (2) of Section 11B of the Act.

3. To the extent that the impugned order directed the Assistant Commissioner to comply with the earlier appellate order dated 22.5.2001 of the Commissioner (Appeals), it is made clear that the appellant does not challenge that part of the

order, and the quarrel is only against the direction which is superimposed for considering the matter in the context of Section 11B(2) of the said Act. The learned Counsel for the appellant emphatically stated that when the assessment was provisional and made final under Rule 9B(5), there was no question of invoking the provisions of Section 11B(2) of the Act and the appellant was entitled to get the refund as ordered under the final assessment order, as directed by the Commissioner (Appeals) in respect of "installation and training charges" which quantified at Rs. 5,84,606/-.

3.1 The learned Counsel for the appellant placed reliance on the following decisions in support of his submissions: *Mafatlal Industries Ltd. v. Union of India* point out from paragraph 95 of the judgment [paragraph 104 of the report of the said case appearing in] that, the Supreme Court has in no uncertain terms held that: "any recoveries or refunds consequent upon the adjustment under Sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B, as the case may be". These observations were made while considering the provisions of Rule 9B, which provide for provisional assessment in situations specified in Clauses (a), (b) and (c) of Sub-rule (1). *Commissioner of Central Excise, Calcutta v. Suntrack Electronics (P) Ltd.* , was cited to point out that the Supreme Court following the decision of the nine member bench in *Mafatlal Industries Ltd.* and after noticing that the amendment vide Notification No. 45/99-CE(NT) dated 25.6.99 was made in Sub-rule (5) of Rule 9B by adding a proviso in order to get over the situation arising in *Mafatlal Industries Ltd.* (supra) held in paragraph 4 of the judgment that, since the law applicable at the relevant time when the refund claim was made was as declared in *Mafatlal Industries Ltd.* (supra), the restrictions under Sections 11A and Section 11B with regard to the procedure for refund did not apply to that appellant's case (c) The decision of Hon'ble the Supreme Court of three member bench in *Commissioner of Central Excise, Mumbai-II v. Allied Photographics India Ltd.* that the supreme Court in a reference made by two member bench referring the question "whether a claim for refund after final assessment is governed by Section 11B of the Central Excise Act, 1944", after considering the decision of the nine member bench in *Mafatlal Industries Ltd.* (supra) and on the provisions of Section 11B of the said Act and Rule 9B of the said rules held in paragraph 12 of the judgment that, Section 11B deals with claim for refund whereas Rule 9B deals

with making of refund, in which case the assessee has not to comply with Section 11B. It was held that Section 11B and Rule 9B operated in different spheres and, consequently, in paragraph 104 of the judgment in Mafatlal Industries Ltd. [in the report of the said case appearing in], it had been held that in cases where duty is paid under Rule 9B and refund arises on adjustment under Rule 9B(5), then such refund will not be governed by Section 11B. Sinkhai Synthetics and Chemicals Pvt. Ltd. v. CCE Aurangabad , which was rendered in the context of the provisions of Section 11B, was cited to point out from paragraph 4 of the judgment that, the Supreme Court had followed the ratio of the decision in Mafatlal Industries Ltd. (supra) by quoting paragraph 95 from the report in ELT (the same as para 104 of the report in SCC), in which it was, inter alia, held that any recoveries or refunds consequent upon the adjustment under Sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B, as the case may be. Star Paper Mills Limited v. Commissioner of Central Excise, Meerut , was cited to point out that a division bench of this Tribunal had, following the ratio of the decision in Mafatlal Industries Ltd. held in paragraph 3 of the order that refund in that case was a consequence of finalization of the provisional assessment, and allowed the appeal. It is stated that a departmental appeal preferred against this order was dismissed by Hon'ble the Supreme Court, reported in 2003 (157) ELT A 143. The Supreme Court held that the order of the Tribunal was supported by judgment of the Supreme Court in Sinkhai Synthetics and Chemicals Pvt. Ltd. (supra). Oriental Exports v. Commissioner reported in 2001 (123) ELT 578, was cited for the proposition that the bar of unjust enrichment was not applicable to refund and recoveries consequent to finalization of provisional assessment. In the process, the Tribunal followed the ratio of the decision of the Supreme Court in Mafatlal Industries Ltd. (supra). It was pointed out that while dismissing the appeal against the decision in Oriental Exports, reported in 2006 (200) ELT A138, the Supreme Court held that the point in issue was squarely covered by three Judge Bench decision in Allied Photographies' case (supra).

4. The learned authorized representative for the department, on the other hand, relying upon the provisions of Sub-section (3) of Section 11B strongly contended that the said provision clearly overrides any contrary provisions in any of the rules including Rule 9B and, therefore, even in cases where the provisional assessment

was finalized under Rule 9B(5), the provisions of Section 11B(2) were squarely attracted by virtue of this specific provision, which is required to be operated irrespective of any contrary decision of any Court and notwithstanding anything contained to the contrary in the provisions of the Act or the Rules. He placed reliance on the decision of Hon'ble the Supreme Court in *Sahakari Khand Udyog Mandal Ltd. v. Commissioner of Central Excise and Customs* reported in 2005 (181) ELT 328(SC), pointing out from paragraphs 45, 48 and 49 of that judgment that the doctrine of unjust enrichment was invoked irrespective of applicability of Section 11B and that as per the said decision, it was held in *Mafatlal Industries Ltd. (supra)* that refund of tax/duty wrongfully paid can be claimed on the basis of doctrine of equity and a person demanding such restitution must plead and prove that he had paid such tax/duty and had suffered loss/injury. He referred to paragraph 99(iii) of the report in ELT of the decision in *Mafatlal Industries Ltd.* in support of his contentions. The learned authorized representative for the department also relied upon a decision of the Bombay High Court, which was upheld by the Supreme Court as *Bussa Overseas and Properties Pvt. Ltd. v. Union of India* reported in 2002 (158) ELT 135(Bombay H.C.) and 2004 (164) ELT A177(SC) pointing out from paragraph 29 of the judgment of the High Court that, it was held therein that if on final assessment, the duty paid provisionally is found to be more than, the differential amount becomes refundable, subject to the limitation prescribed in Section 27 of the Customs Act (which incorporated the principles of unjust enrichment).

5. It would appear from the provisions of Section 11B that any person claiming refund of any duty of excise is required to make an application for refund of such duty to the proper officer within the time prescribed. Under Sub-section (2) of Section 11B, the concerned officer dealing with such application may make an order on such application, if he is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable. That order ordinarily would include a direction to credit the amount to the "Fund" as defined in Section 2(ee) of the Act, unless the matter is governed by the proviso to Sub-section (2) of Section 11B, in which case instead of the amount being credited to the fund it is required to be paid to the applicant. Sub-section (3) of Section 11B has an overriding effect in the following terms: 11B(3)-Notwithstanding anything to the contrary contained in any

judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).

6. It would appear from the wordings of Sub-section (3) of Section 11B which are that, unambiguous that, no refund shall be made except as provided in Sub-section (2) of Section 11B. Sub-section (3) of Section 11B overrides the rules made under the said Act which would obviously include Rule 9B in its entirety, i.e., including even Sub-rule (5) of Rule 9B. This would seem to suggest that refund arising due to finalization of provisional assessment would also be subject to the provisions of Sub-section (2) of Section 11B of the Act.

7. As noticed above the Hon'ble the Supreme, while considering the provisions of Section 11B and Rule 9B has concluded the controversy in Allied Photographies' case reported in 2004 (166) ELT 3(SC), by holding in a reference made by two member Bench, that the bar of unjust enrichment is not applicable to the refund assessment consequent upon the finalization of assessment under Rule 9B(5). The Hon'ble Supreme Court while dismissing the civil Appeal No. 4231 of 2001 against the order of the Tribunal in Oriental Exports v. Commissioner (supra) made the following order as reported in 2006(200) ELT A 138: The Tribunal, in the impugned order, following its earlier decision, in Needle Industries India Ltd. v. CCE the view that the doctrine of unjust enrichment is not applicable to provisional assessment in terms of Section 18 of the Customs Act which is similar to Rule 9B of the Central Excise Rules. Commissioner of Central Excise, Mumbai v. Allied Photographics India Ltd. v. Allied Photographics India Ltd. , noticing the inconsistency, doubted the correctness of two decisions rendered by three-Judge Bench of this Court in, i.e., (i) Sinkhai Synthetics and Chemicals (P) Ltd. v. Commissioner of Central Excise and Mafatlal Industries Ltd. v. Union of India The three -Judge Bench which considered the correctness of the aforesaid two decisions (of three-Judge Bench) has in Commissioner of Central Excise, Mumbai-II v. Allied Photographies India Ltd. held that the judgment in Sinkhai Synthetics's case (supra) was per incuriam [para 14 at page 52] and approved the decision in the later case, i.e., TVS Suzuki's case (supra). The three Judge Bench has also

taken the same view, as was taken by the Tribunal to the effect that the doctrine of unjust enrichment is not applicable to the provisional assessment even after the finalisation thereof.

The point in issue in the present case is, thus, squarely covered by the three-Judge Bench decision in Allied Photographics' case . In view of this, the appeals are dismissed and 8. In view of the categorical statement of law as reflected in the aforesaid decisions of Hon'ble the Supreme in Allied Photographics' Ltd. (supra) and Oriental Exports v. Commissioner in the affirming order, there is absolutely no scope for the Revenue to try to rely on the provisions of Sub-section (3) of Section 11B, because the Hon'ble Supreme Court obviously would have taken into consideration the same provision.

9. For the foregoing reasons, the portion of the impugned order to the extent that it directs the adjudicating authority to consider the appellant's refund claim in the light of Section 11B(2), is hereby set aside and the adjudicating authority is directed to act as per the other directions contained in the orders of the Commissioner (Appeals).

The appeal is accordingly allowed.

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