

SUPREME COURT OF INDIA

Sinkhai Synthetics & Chemicals Pvt. Ltd.

Vs.

Collector of Central Excise

(S Bharucha, N S Hegde and S V Patil JJ.)

16.04.2002

ORDER

1. The assessee claimed the benefit of an exemption notification. The revenue challenged the claim. The matter 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.

2. In September, 1991 the provisions of Section 11-B were amended, and it now reads:

"11B. Claim for refund of duty. - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the assistant commissioner of central excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in Section 12A as the applicant may furnish to establish that the amount of duty of excise, in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty had not been passed on by him to any other person;

Provided that where an application for refund has been made before the commencement of the *Central Excises and Customs Laws (Amendment) Act, 1991*, such application shall be deemed to have been made under the sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) substituted by that Act:

Provided further that the limitation of six months shall not apply where any duty has been paid under protest. (2) If, on receipt of any such application, the assistant commissioner of central excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the fund: Provided that the amount of duty of excise as determined by the assistant commissioner of central excise under the

foregoing provisions of this sub-section shall, instead of being credited to the fund, be paid to the applicant, if such amount is relatable to -

- (a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
- (b) unspent advance deposits lying in balance in the applicant's account current maintained with the commissioner of central excise;
- (c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;
- (d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;
- (e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;
- (f) the duty of excise borne by any other such class of applicants as the central government may, by notification in the official gazette specify;

Provided further that no notification under Clause (f) of the first proviso shall be issued unless in the opinion of the central government the incidence of duty has not been passed on by the persons concerned to any other person.

(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).

Explanation. - For the purposes of this section...

(B) 'relevant date' means -

(f) in any other case, the date of payment of duty."

3. On 3rd July, 1993 the assesseees were served with notices which asked them to show cause why the amounts of excise duty paid by them under protest should not be retained by the revenue, having regard to the provisions of Section 11-B as amended. The assesseees showed cause, but to no avail. This matter also, ultimately, reached the tribunal and, by the order under challenge, the tribunal upheld the contention of the revenue.

4. Subsequent to this decision of the tribunal a bench of nine learned judges of this Court has resolved the issue in favour of the assesseees. The judgment is in Mafatlal Industries Limited

v. Union of India . The relevant paragraph is para (95), and it, so far as is relevant, reads thus:

"Rule 9B provides for provisional assessment in situations specified in Clauses (a), (b) and (c) of Sub-rule (1). The goods provisionally assessed under Sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that when the duty leviable on the goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be'. 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."

5. It is fairly not disputed by learned counsel for the revenue that the decision in Mafatlal Industries Limited governs the appeals.

6. Accordingly, the appeals are allowed and the order under appeal is set aside. Consequential repayments shall be made within twelve weeks.

7. There shall be no order as to costs.