

**SUPREME COURT OF INDIA**

Commissioner of C. Ex., Mumbai

Vs.

Allied Photographics India Ltd.

(S.N. Variava and H.K. Sema JJ.)

13.11.2003

**ORDER**

1. In this appeal, a question has arisen whether a claim for refund can be allowed without taking into consideration the doctrine of unjust enrichment after final assessment.

2. Reliance has been placed upon a 3-Judge Bench decision of this Court in the case of *Sinkhai Synthetics and Chemicals Pvt. Ltd. v. C.C.E., Aurangabad reported in*<sup>1</sup> wherein from the facts it would appear that a final assessment had taken place. This Court held as follows:-

"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 as-sessees. The judgment is in *Mafatlal Industries Limited v. Union of India*<sup>2</sup>. 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."

3. It is to be noted that this decision proceeds on a concession made by counsel for the Revenue. The question whether on a final assessment the doctrine of unjust enrichment would apply was not dealt with as it was not argued. Further, this judgment basis itself on the above quoted paragraph in *Mafatlal Industries Ltd. case* . However, the entire paragraph in *Mafatlal Industries case* reads as under:-

"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." However, if the final orders passed under Sub-rule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9B(5) reagitating the issues already decided under Rule 9B - assuming that such a refund claim lies -and is allowed, it would obviously be governed by Section 11B. It follows logically that position would be the same in the converse situation."

(Emphasis supplied)

4. From the portion highlighted above, it appears that the nine-Judge Bench in Mafatlal Industries case is laying down that if a final order is passed, then a refund claim would be governed by Section 11B.

5. Reliance was also placed upon another 3-Judge Bench decision of this Court in the case of *Commissioner of Central Excise, Chennai v. T.V.S. Suzuki Ltd.*, reported in<sup>3</sup> wherein also there was a final assessment. Here again the latter portion of the paragraph from Mafatlal Industries case has not been noticed.

6. To us it appears that the aforementioned two decisions of 3-Judge Benches are against the law as laid down by the 9-Judge Bench in Mafatlal Industries Limited. As the judgments are of 3-Judge Benches and the question of law is an important question, we consider it necessary that the question whether a claim for refund made after a final assessment is governed by Section 11B, be referred to a Larger Bench. The papers may be placed before the learned Chief Justice for constituting a Larger Bench.

7. It must be mentioned that it was submitted on behalf of the respondents that even in this case there were only provisional assessments. This submission has been disputed by learned counsel for the appellants. However, at present we are not going into this disputed question as we feel that this question requires to be determined by a Larger Bench.

<sup>1</sup>2002 (143) ELT 17

<sup>2</sup>1997 (89) ELT 247

<sup>3</sup>2003 (156) ELT 161