

COMMISSIONER OF CENTRAL EXCISE, CHENNAI

v.

M/S. T.V.S. SUZUKI LTD. HOSUR

AUGUST 6, 2003

[S. RAJENDRA BABU, B.N. SRIKRISHNA AND G.P. MATHUR, JJ.]

Central Excise Act, 1944; Rule 9B(5) and its Proviso & Section 11B: Refund claim—Proviso to Rule 9B(5) vis-a-vis Section 11B—Applicability of—Held: Refund claim after adjustment under Rule 9B(5) would not be governed by the restrictions under Section 11B—Since Proviso to Rule 9B(5) was introduced when refund claim of the assessee was pending with the Revenue, right of the assessee does not get defeated by the subsequent amendment in the provision of law—Tribunal rightly held that claim for refund had to be decided in accordance with the existing law.

Assessee, a Public Sector Undertaking, filed an application for refund claim after completion of final assessment. Assistant Commissioner, Central Excise, rejected the claim on the ground of limitation. But the order was reversed by the appellate authority and it was affirmed by the CEGAT. Hence the present appeals.

It was contended for the Revenue that since the refund claim of the assessee was pending with the Revenue, when Proviso to sub rule (5) of Rule 9B was introduced by way of an amendment, it had to be adjudicated in accordance with the amended provision of law.

Dismissing the appeals, the Court

HELD: Merely because the departmental authorities took a long time to process the application for refund, the right of the assessee does not get defeated by the subsequent amendment made in sub-rule (5) of Rule 9B of the Central Excise Act. The Commissioner of Central Excise and the CEGAT were, therefore, justified in holding that the claim for refund made by the assessee had to be decided in accordance with law laid down by this Court in *Mafatlal Industries Ltd.* and would not be governed by the proviso to sub-rule (5) of Rule 9B. [284-C, D]

Mafatlal Industries Ltd. and Ors. v. Union of India and Ors., [1997] 5 SCC 536, followed.

A *Sinkhai Synthetics & Chemicals Pvt. Ltd. v. C.C.E. Aurangabad, [2002] 143 ELT 17 (SC) and Commissioner of Central Excise, Meerut v. M/s. Star Paper Mills Ltd., [2003] 7 SCC 27, relied on.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2416 of 2000.

B From the Judgment and Order dated 21.7.1999 of the Central Excise, Customs and Gold (Control) Appellate Tribunal, Madras in A. No. E/3292/98 in F.O. No. 1786 of 1999.

WITH

C C.A. Nos. 2891, 8380/2001 and 610-611 of 2002.

M.L. Verma, Ms. Nisha Bagchi, P. Manish and B.K. Prasad for the Appellant.

Rajendra Singhvi, Ashok K. Singh, V. Lakshmi Kumaran, Aolk Yadav, V. Balachandran and Staish K. Agnihotri for the Respondent.

D The Judgment of the Court was delivered by

SRIKRISHNA, J.

Civil Appeal No. 2416 of 2000

E On 5.7.1996 the respondent filed an application for refund claim of Rs. 1,48,58,630.94 after the final assessment was completed. The Assistant Commissioner of Central Excise issued a show cause notice dated 9.7.1996 as to why the claim should not be rejected for non-compliance with Section 11B of the Central Excise Act, 1944. After considering the reply filed by the respondent the Assistant Commissioner of Central Excise by his order 17th July, 1996 rejected the refund claim of the respondent on the ground that the refund claim had been made beyond the period of limitation and that respondent was unable to show that the amount of excise duty for which the refund was claimed, had not been passed on to any other person. On appeal, the Commissioner of Central Excise, in his order dated 19th June, 1998 observed that on the date on which the Assistant Commissioner of Central Excise made the above order (i.e 17.7.1996), the assessment was only provisional and that the assessment was finalised only on 25.7.1996. In the circumstances, the Commissioner was of the view that the refund claim was not time barred. Following the law laid down by this Court in *Mafatlal Industries Ltd. & Ors. v. Union of India & Ors.*, [1997] 5 SCC 536, he held

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that the concept of unjust enrichment would not be attracted on finalisation of provisional assessments. He consequently allowed the refund claim. On appeal the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as 'CEGAT') agreed with the view of the Commissioner and dismissed the appeal. Hence, the department is in appeal before us. A

In *Mafatal Industries Ltd.* (supra) a Bench of nine learned Judges of this Court held that refund claims consequent upon the adjustment under sub-rule (5) of Rule 9B would not be governed by the restrictions of Section 11A or Section 11B, as the case may be. This Court observed (vide paragraph 104) as under: B

"Rule 9-B 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 is 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 9-B will not be governed by Section 11-A or Section 11-B, as the case may be." C
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In order to get over the situation arising under *Mafatal Industries Ltd.* (Supra) vide notification No. 45/99-CE (NT) dated 25.6.1999, an amendment was made in sub-rule (5) of Rule 9B by adding a proviso thereto. The effect of the proviso is that, even after finalisation of the provisional assessment under Rule 9B (5), if it is found that an assessee is entitled to refund, such refund shall not be made to him except in accordance with the procedure established under sub-section (2) of Section 11B of the Act. F

There is no dispute that the refund claim in this case was made much prior to the addition of the proviso in sub-rule (5) of Rule 9B. On the date on which the refund claim was made, the law applicable was the law as declared by this Court in *Mafatal Industries Ltd.* (supra) which we have reproduced above. However, it is contended by the learned counsel Shri Verma for the department, that the claim of refund would be governed by the proviso introduced in sub-rule (5) of Rule 9B, and that as a consequence, the H

A restrictions in Section 11A and Section 11B with regard to the procedure for refund would apply to the case of the respondent. The same question came up for consideration of this Court in *Sinkhai Synthetics & Chemicals Pvt. Ltd. v. C.C.E., Aurangabad*, (2002) 143 E.L.T. 17 SC. This Court took the view that the case would be governed by the rule laid down in *Mafatlal Industries Ltd.* (supra). This view has been reiterated in a subsequent judgment of this Court in C.A. No. 2533 of 2001. (*Commissioner of Central Excise, Meerut v. M/s. Star Paper Mills Limited*, [2003] 7 SCC 27) upholding the view of the tribunal that the refund claim of the assessee before the court was justified.

C Shri Verma fairly concedes that the proviso introduced in sub-rule (5) of Rule 9B cannot be said to be retrospective in operation. He, however, contends that on the date on which the proviso was brought into force, i.e. 25.6.1999, the refund claim was still pending with the departmental authorities and, therefore, it had to be adjudicated in accordance with the law as it became enforceable from 25.6.1999. In our view, this contention cannot be accepted. Merely because the departmental authorities took a long time to process the application for refund, the right of the assessee does not get defeated by the subsequent amendment made in sub-rule (5) of Rule 9B. The Commissioner of Central Excise and the CEGAT were, therefore, justified in holding that the claim for refund made by the respondent had to be decided according to the law laid down by this Court in *Mafatlal Industries Ltd.* (supra) and would not be governed by the proviso to sub-rule (5) of Rule 9B.

E In the result, we find no merit in appeal. The appeal is accordingly dismissed. However, there shall be no order as to costs

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F In all these appeals the question which arises for our consideration is identical. The refund claims were made pursuant to the finalisation of provisional assessment orders and prior to 25.6.1999, i.e. the date on which the proviso to sub-rule (5) of Rule. 9B came into force. In our view, therefore, all these cases would be governed by the rule in *Mafatlal Industries Limited* (supra) namely that the restrictions in Section 11A and Section 11B would not apply to refund claims consequent upon finalisation of provisional assessment orders.

Hence, these appeals are dismissed.

No. costs

H S.K.S.

Appeals dismissed