CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, ALLAHABAD

APPEAL NOS. E/3978/2006 & E/609/2009

[Arising out of common Order-in-Appeal No. 153-Central Excise /GZB/2006 dated 22.09.2006 passed by the Commissioner of Customs and Central Excise (Appeals), Ghaziabad]

M/s Hindustan Lever Ltd. Appellant

Versus

CCE, Ghaziabad Respondent

Appearance:

Shri Ravinder Narain, & Ms. Mallika Joshi, Advocate for the appellants.
Shri Mohd. Altaf, AR for the Respondent.

Date of Hearing/Decision:12.10.2017

Coram :

Hon'ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Shri Anil G. Shakkarwar, Member (Technical)

Final Order No. 70697-70698/2019

Per: Anil Choudhary:

The core issue in both the appeals is common and as such they are being taken up together for disposal.

2. The question for consideration in the present appeals, is that, where Provisional Assessment is made under Rule 9B of the erstwhile Central Excise Rules, 1944, is finalised under Sub-Rule (5) of Rule 9B and the Adjudicating Authority himself determines the excess amount paid towards duty, then whether the refund of the excess amount so determined is to be made to the assessee, without applying the test of 'unjust enrichment'.

3. Learned Counsel for the Appellant Mr. Ravinder Narain with Mr. Ajay Aggarwal and Ms. Mallika Joshi, Advocates, contended that in both the connected Appeals the Appellant is claiming the amount of Refund only on the basis of the order of the Assistant Commissioner dated 05.05.1997, finalising the Provisional Assessment under Rule 9B(5), in respect of the three financial years 1988-89, 1989-90 and 1990-91. During the said period, the Appellant paid duty of excise at the higher rate, in respect of soaps on Provisional basis under Rule 9B of the erstwhile Central Excise Rules, 1944. The said Provisional assessments were finalized by the jurisdictional Assistant Commissioner under Rule 9B(5) of the above Rules by passing three separate orders, each dated 05.05.1997, in relation to each of the three financial years, 1988-89, 1989-90 and 1990-91 and determined the duty finally payable, after allowing permissible deductions, inter alia, relating to secondary freight and accordingly calculated the amount of duty excess paid by the Appellant, for each of the three years which had become refundable. The duty excess paid to be refunded, is tabulated below:

In Rs.

Year	Duty paid	Duty payable (as determined)	Excess paid
1988-89	91334494	81011719	10322775
1989-90	87421030	79304969	8116061
1990-91	103883379	97946828	5936551
TOTAL			243,75,387

4. The Learned Counsel contented that the above amount is refundable in view of the specific provision contained in Sub-Rule (5) of Rule 9B of the Central Excise Rules, 194 which 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 fall 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".*

5. The Learned Counsel further contented that in view of the decision the larger bench consisting of Nine Hon'ble Judges' of the Supreme Court in the case of Mafatlal Industries Limited - 1997 (89) ELT 247 (SC), the test of 'unjust enrichment' would not apply to refunds consequent upon the adjustment under Sub Rule (5) of Rule 9B and will not be governed by Section 11A or Section 11B of the Central Excise Act, 1944. The Learned Counsel specifically pointed out para 95 of the said judgment, wherein the aforesaid law was laid down. For ready reference para 95 of the said judgment is quoted below:

> *"95.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 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 9B <u>will not be governed by Section 11A or Section 11B,</u> as <u>the case may be.</u> 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) re-agitating 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."*

6. The Learned Counsel further clarified that since the aforesaid refund became payable as per the final orders passed by the adjudicating authority himself dated 05.05.1997, and not as a result of any appellate order, as per the above decision, the test of 'unjust enrichment' would not apply to the refund of the amount of Rs.2,43,75,387/- determined to have been paid in excess to be refunded, as set out in the above table.

7. The Learned Counsel also pointed out that the above decision in the case of Mafatlal Industries was also followed in subsequent cases and law was further clarified by a three Judge Bench of the Hon'ble Supreme Court, in the case of *Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd. – 2004 (166) ELT 3 (SC)*. In this case after referring to the aforesaid larger Bench decision of Hon'ble Supreme Court in the case of Mafatlal Industries and setting out Rule 9B relating to finalization of Provisional Assessment, it is held in para 7 that –

> "*the said Rule 9B was a complete code by itself. On compliance with the condition therein, the proper officer was duty bound to refund the duty without requiring the Assessee to make a separate refund application. it is further clarified in para 9 that – 'Section 11B (as amended) applied to claiming of refunds where the burden was on the Applicant to 'apply within time' and prove that the 'incidence of duty has not been passed on' whereas Rule 9B covered cases of 'ordering of refund / making of refund', where on satisfaction of the conditions, the concerned officer was 'duty bound to make the order of refund' and in which case 'question of limitation' did not arise and, therefore, there was no 'no requirement on the part of the Assessee to apply for refund under Section 11B"*.

8. The Learned Counsel clarified the scope of both the Appeals which are connected.

a. In Appeal No. E/3978/2006-Excise, the impugned order is the order passed by the Commissioner (Appeals) dated 22.09.2006 (Annx-H) in Appeal paper book. In the said order, although the contention of the Appellant herein is noted, at pg.84 that the Adjudicating Authority,

> “has rejected the refund claim mainly on the ground of unjust enrichment and limitation, which are not applicable in this case as the Appellant became entitled for the refund on finalisation of the assessment on 05.05.1997 under Sub Rule (5) of Rule 9B”

and after noting the further contentions and the clarifications, of Appellant, the Commissioner (Appeals) finally held in the last para as under:

> *“From the above it appears that the Adjudicating Authority had not examined whole issue in the right perspective. Therefore, I remand the case to the Adjudicating Authority for deciding the case afresh after affording opportunity of personal hearing to the Appellant taking into account the facts as discussed supra”.*

Since the Commissioner (Appeals) did not grant relief, and again remanded the matter, being aggrieved, the appellant filed the present appeal No.E-3978 of 2006-Ex, before this Hon’ble Tribunal.

b. With regard to the connected Appeal No.E/609/2009, the Learned Counsel clarified that while the aforesaid appeal No. E/3978 of 2006 was pending before this Hon'ble Tribunal, the Assistant Commissioner to whom the matter was remanded as aforesaid, took up the matter for hearing and passed an ex-parte order dated 26.11.2007, once again, rejecting the refund claims of the Appellant. (Annexure A – Pgs.12-17 of the Appeal paper book)

The Learned Counsel further pointed out that the appeal against the aforesaid ex-parte order dated 26.11.2007 of the Assistant Commissioner was also rejected by the Commissioner (Appeals) by an ex-parte order dated 16.12.2008 holding that the bar of unjust enrichment applied. (Annexure B-Pgs.18-23 of Appeal paper book).

The Learned Counsel clarified that the connected Appeal No. E/609-2009 has been filed before this Hon'ble Tribunal against the above order of Commissioner (Appeals) dated 16.12.2008.

9. The Learned Counsel contended that in both the connected Appeals, the core issue is whether the test of 'unjust enrichment' was applicable in the case of the orders passed by the Adjudicating Authority himself dated 05.05.1997, under Sub-Rule(5) of Rule 9B, finalizing the provisional assessment and arriving at duty excess paid by the Assessee. The Learned Counsel submitted that this issue stood settled by the aforesaid decision of the Hon'ble Supreme Court in the cases of Mafatlal Industries (Supra) and Allied *Photographics* (Supra) to the effect that in respect of such order finalizing the provisional assessment and determining the excess duty paid to be refunded, the bar of 'unjust enrichment' did not apply. The Learned Counsel further submitted that there was no requirement of making a refund claim and even the question of limitation did not arise, as held in the case of CCE, Mumbai Vs. Allied Photographics [Supra]. As such, the Appeals ought to be allowed and direction be given for payment of the refund amount determined by the aforesaid orders dated 05.05.1997 for the amount set out in the above table together with interest thereon.

10. We have heard the elaborate arguments advanced by Shri Ravinder Narain, Learned Counsel for the Appellant, as noted above. We have also heard the Learned DR, who though reiterated the impugned orders, did not

seriously dispute the aforesaid legal position, ably analyzed by the Learned Counsel for the Appellant.

11. We have noted the statement made by the Learned Counsel for the Appellant that the two connected Appeals were being confined only to the amount refundable pursuant to the final orders passed by the Adjudicating Authority dated 05.05.1997 upon finalization of the provisional assessment under Rule 9B(5), as tabulated above.

12. The Learned Counsel clarified that the Appellant was not pressing the claim for refund which became payable subsequently, as a consequence of the Appellate Orders passed in favour of the Appellant. This is so, as it was specifically held by the Larger Bench of the Hon’ble Supreme Court, in para 95 of the aforesaid judgment in the case of Mafatlal Industries, that any refund claim arising as a consequence of the decision of an Appeal would be governed by Section 11B and would be subject to the test of ‘unjust enrichment’. As such, the refund order dated 29.03.2000 passed by the Assistant Commissioner allowing further deductions on account of freight, pursuant to the order of the Commissioner (Appeals) dated 16.07.1998 amounting to Rs.64,66,307/- for the aforesaid three financial years 1988-89, 1989-90 and 1990-91, was not being pressed by the Appellant and are not dealt with in this order.

13. The Learned Counsel further clarified that Rule 9B (5) was amended prospectively with effect from 26.05.1999, and thereafter even in respect of orders passed by the Adjudicating Authority himself finalizing the provisional assessment under Rule 9B(5), the provisions of Section 11B became applicable and as such, the test of ‘unjust enrichment’ became applicable. He

clarified that in view of this amendment, in respect of the subsequent order passed after 25.06.1999, by the Adjudicating Authority under Rule 9B(5), determining further amounts of excise duty paid in excess, being the order dated 29.03.2000 passed by the Assistant Commissioner himself, relating to the later period 1995-96 and 1996-97 in the sum of Rs.13,43,191/-, the Appellant was not pressing the claim for refund of Rs.13,43,191/-, having been ordered on 29.03.2000, after the amendment dated 25.06.1999. This aspect of the matter is clarified in the judgment of Hon'ble Supreme Court in the case of CCE, Chennai Vs. TVS Suzuki Ltd. reported in 2003(156) ELT 161 (S.C.), wherein it is held that the aforesaid amendment is prospective and not retrospective.

14. We have considered the contentions raised by both the parties. We find that the claim of Appellant in the present appeals which is being confined to the refund of the amount of Rs.2,43,75,387/- relating to three assessment years 1988-89, 1989-90 and 1990-91, as per orders of the Assistant Commissioner himself dated 05.05.1997 passed upon finalization of Provisional assessment under Rule 9B(5), is not subject to the test of 'unjust enrichment', as held by the aforesaid judgment of the Larger Bench of the Hon'ble Supreme Court in the case of Mafatlal Industries (supra) and the subsequent judgment of the Hon'ble Supreme Court in the case of Allied *Photographics* (supra). As such, we hold that the said amount ought to have been paid to the Appellant immediately upon the finalization of Provisional Assessment by orders dated 05.05.1997, passed under Rule 9B(5) by the Adjudicating Authority. This has not been done by the Department, driving the Appellant to needless multiple rounds of litigation over the years. We

accordingly direct that the amount of refund, being the sum of Rs.2,43,75,387/- is to be paid to the Appellant forthwith together with interest thereon as per Rules, commencing from the date of the final order under Rule 9B(5), till the date of actual payment.

15. Both the connected Appeals are allowed accordingly with consequential relief.

(Operative portion of the order was pronounced in open Court).

(Anil Choudhary)
Member (Judicial)

(Anil G. Shakkarwar)
Member (Technical)

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