

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH-COURT NO. 1**

Customs Appeal No. 52739 of 2019

[Arising out of Order-in-Appeal No. Comm/ Appeal/
DLH/CUS/Import/NCH/265/2017 dated 23.08.2019 passed by the Commissioner
of Customs (Appeals) New Customs House, New Delhi]

Cisco Systems India Private Limited

Appellant

2nd Floor, Brigade South Parade,
10 M G, Road, Bengaluru-560001

Versus

Commissioner of Customs,(Appeals)

Respondent

New Customs House, Near IGI Airport,
New Delhi

Appearance

Shri B L Narasimhan, Shri Rachit Jain and Ms. Pooja Aggarwal, Advocates
for the Appellant

Shri Sunil Kumar, Authorised Representative for the Department

Coram:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. C L MAHAR, MEMBER (TECHNICAL)

Date of Hearing/ Decision: October 14, 2020

FINAL ORDER NO. 51573 / 2020

JUSTICE DILIP GUPTA

1. The order dated August, 22, 2019 passed by the
Commissioner of Customs (Appeals) New Delhi¹, dismissing
the appeal that had been filed by the Appellant to assail the

1. the Commissioner (Appeals).

order dated August 01, 2017 passed by the Assistant Commissioner of Customs has been challenged in this Appeal. This order of the Assistant Commissioner rejected the refund claim filed by the Appellant for an amount of Rs. 46,53,86,615/- under section 27 of the Customs Act, 1962².

2. The Appellant is, inter alia, engaged in the import of goods for providing captive services in the nature of software development, sales and marketing support, product replacement services and other support services to its affiliates. The Appellant had imported goods from related parties during the period April 2004 to June 2008 and had submitted Bills of Entry from time to time, which were assessed after loading the declared invoice value so as to make the value equal to 58 % of the global price list of the Appellant in terms of order dated August 26, 2004 passed by the Assistant Commissioner of Customs (Special Valuation Branch), New Delhi. The goods were, accordingly, cleared on payment of duty on the loaded value.

3. However, feeling aggrieved by the said order dated August 26, 2004, the Appellant filed an appeal before the Commissioner (Appeals), who by order dated August 20, 2007 remanded the matter to the Adjudicating Authority to assess the goods after verifying the data submitted by the Appellant and after complying with the principles of natural justice.

2. the Customs Act.

4. This time, the Assistant Commissioner of Customs by order dated April 23, 2009 ordered that the price may be enhanced to 46% of the global price list for the years 2000 to 2008. This order dated April 23, 2009 was accepted by both the Appellant and the Department.

5. The Appellant, thereafter filed a refund claim on April 12, 2010 under section 27 (1) of the Customs Act since duty had been paid on 58% loaded value.

6. A Show Cause Notice dated June 14, 2010 was issued to the Appellant proposing to reject the refund claim on the following grounds:

(i) The Appellant had not submitted the re-assessed copy of the Bills of Entry, in the absence of which the claim for refund was not maintainable;

(ii) The Appellant had not submitted any evidence that payment of duty was made under protest and so the refund claim was barred by limitation provided under section 27 of the Customs Act.

7. The Appellant filed a reply to the show cause notice stating, inter alia, that payment of duty by the appellant has to be treated as paid under protest since the Appellant had filed an appeal against the assessment order and, therefore, the limitation of claiming refund under section 27 of the Customs Act would not apply. However, the Assistant

Commissioner of Customs, by order dated August 31, 2010, rejected the refund application.

8. Feeling aggrieved, the Appellant filed an appeal before the Commissioner (Appeals), who by order dated February 10, 2011 dismissed the appeal.

9. The Appellant, thereafter filed an appeal before this Tribunal which appeal was disposed of by order dated April 13, 2016. The matter was remanded to the Adjudicating Authority and the observations of the Tribunal are as follows:

"9. As per the provisions of section 27 of Customs Act, 1962, refund claim is required to be filed before the expiry of six months from the date of payment made by the assessee. However, as per 2nd proviso to section 27 (1)(b), such limitation of one year/ six months as the case may be, shall not apply when any duty and interest has been paid under protest. The appellants have strongly contended that duty stand paid by them under protest, during the pendency of the appeal before the Commissioner (Appeals) and inasmuch as such protest never stands vacated by the Revenue, no limitation would be available to the Revenue so as to deny the refund claim.

10. On the other hand, Revenue's stand is that the dispute on the valuation, came to an end with effect from 23.04.2009 with the passing of order by Astt. Commissioner SVB allowing the declared value by 46% of the GPA. As such, limitation to file refund claim start running from the date of said order and refund claim filed on 12.04.2010 is barred by limitation.

11. We find that there is no clear finding by the authorities below on the fact of duty having been paid under protest. Even the appellant has not been placed on record any documentary evidence to reflect upon the said effect. **On going through the second proviso to section 27, we find that same clearly lays down that the limitation period shall not apply when any duty has been paid under protest.** The second proviso nowhere restricts the limitation to passing of any order by the original adjudicating authority nor refers to any alternative date. It simplicitor is to the effect that limitation will not apply when the duty has been paid under protest. **Infact, we find that the 4th proviso to section 27 (1) is to the effect that where the duty become refundable as a consequence of judgment,**

decree, order direction of the appellant authority, Appellate Tribunal or any court, the limitation of one year or six months, as the case may be, shall be computed from the date of such judgment decree, order, or direction. However, we note that the said proviso is applicable only when the refund arises as a consequence of the order passed by the higher appellate authority. In that case, the assessee is required to file refund application within a period of one year or six months from the date of order.

However, we find that the present refund application has not arisen as a consequence of any order passed by the higher appellate forum. Commissioner (Appeals) in his order dated 28.08.07 simplicitor remanded the matter to the original adjudicating authority to pass a **denovo order**. As such, it cannot be clearly concluded that the refund has not arisen out of order in appeal and it is only after the denovo proceedings were finally concluded by the adjudicating authority vide his order dated 23.04.2009, that the appellant become entitled to the refund.

12. The legal question which arises is that when the duty was paid under protest whether the period of limitation as provided under section 27 would be applicable or not. We have already observed that the second proviso to section 27 (1) is simplicitor to effect that limitation will not be applicable where the duty has been paid under protest. The second proviso is neither extending the period nor limiting the same. **As such, we agree with the learned Advocate that if the duty has been paid under protest and in the absence of any vacation of that protest by the authorities, the limitation period may not apply.**

15. **However, as already observed, the fact as to whether the duty was paid under protest or not does not stand substantiated before us by production of sufficient documentary evidence. As such, we are of the view that inasmuch as neither of the authorities below have given categorical finding that duty was actually paid under protest, the matter needs to be remanded to the original adjudicating authority, for examining the above fact. In the alternative, the appellants plea that the fact of filing the appeal before the higher authorities itself amount to duty payment under protest, would also be considered by the adjudicating authorities in the light of various decisions, which may be brought to his notice by the assessee."**

(emphasis supplied)

10. On remand, the Commissioner (Appeals) rejected the appeal filed by the Appellant. The Commissioner (Appeals) noted that in terms of the directions issued by the Tribunal it was necessary to decide whether the amount of duty was paid

by the Appellant under protest and whether time limit stipulated under section 27 of the Customs Act would be applicable. These two issues were required to be decided on the basis of two parameters, namely, whether sufficient documentary evidence had been provided to substantiate the claim regarding payment of duty under protest; and whether filing of appeal before the higher authority itself would amount to duty paid under protest in the light of various judgments.

11. The findings recorded by the Commissioner (Appeals) on these two issues are reproduced below:

"7. **As regards the issue of evidence** having been placed on record by the party to substantiate their claim at the relevant point of time that such duty was paid by them under protest, **I find that the party has failed to place any such evidence on record from which it can categorically be deciphered that such amount of Customs Duty to the tune of Rs. 46,53,86,615/- was paid by them under protest.**

8. On the contrary, vide their written submissions dated 19.08.2019, they have argued on the issue that SVB Order dated 26.08.2004 was challenged by way of an appeal implies that all the duties paid during pendency of such appellate proceedings should be treated/ deemed to have been paid under protest. This also indicates that the parties does not have any such documentary evidence on the basis of which it can be concluded that payment of Customs Duty was made under protest.

9. **Now coming to the plea of the party that they challenged the SVB Order dated 26.08.2004 which itself implies that the duty was paid by them under protest, I find that the Hon'ble Tribunal, vide the said Order had directed that such plea of the party needs to be analysed in the light of various decisions, which may be brought to the notice by the party herein.**

10. **In this regard, I note that in support of their aforesaid contention, the party has relied upon several judgments/ case laws; viz.**

- (i) Union of India vs. Kamlakshi Finance Corporation Limited, 1991 (55) ELT 433 (S.C.)
- (ii) Pals Micro Systems Ltd. vs. CCE, Manglore [2007 (212) ELT 373 (Tri.-Bang.)]
- (i) Mafatlal Industries, 1997 (89) ELT 247 (SC);
- (ii) Mohit World vs. Commissioner of Customs Mumbai-II-2014 (9) TMI 987, CESTAT-MUMBAI.
- (iii) CCE Chennai II vs. Electro Steel Casting Ltd., 2014 (299) ELT 305 (Mad.);
- (iv) Big Apple & Others vs. Commissioner of Customs, Bangalore-2011 (11) TMI 155, CESTAT, Bangalore;
- (v) Hutchison Max Telecom Pvt. Ltd. vs. CCE, Mumbai-2004 (165) ELT 175 (Tri.- Del)
- (vi) CCE, Chandigarh vs. Ind Swift Lands Ltd.- 2017 (6) GSTL 21 (P & H);

11. On going through the judgments referred and relied upon by the party, I find that none of the judgments cover period after 2007 when provisions of section 27 of Customs Act, 1962 were amended, except judgments mentioned at S. No. (viii) above. A perusal of the judgment CCE, Chandigarh vs. Ind Swift Land Ltd. also reveal that the facts of the case are entirely different in as much as no such letter of "payment of duty under pressure or protest to the concerned Asstt. Commissioner" could be produced by the party in the instant case.

12. The O-I-O passed by the Adjudicating Authority is very detailed and I don't find any ground to interfere with the said order. The appeal filed by the appellant has no legs to stand and hence does not merit any consideration."

(emphasis supplied)

12. Shri B. L. Narasimhan learned Counsel appearing for the Appellant made the following submissions:

- (i) The refund claim is not barred by time as the differential duty was deposited under protest for the reason that filing of an appeal against the assessment order has to be considered as the payment of duty

under protest. In this connection reliance has been placed on the following decisions:

- a) **Mafatlal Industries Ltd. vs. Union of India**³
- b) **M/s Hutchison Max Telecom Pvt. Ltd. vs. CCE, Mumbai**.⁴
- c) **Bayshore Glass Trading Pvt. Ltd. vs. CCE, Kolkata**⁵
- d) **M/s Parle Biscuits Pvt. Ltd. vs. Commissioner of Customs, Mumbai**⁶
- e) **M/s Big Apple vs. CCE, Hyderabad**⁷
- f) **RFB Rig Corporation LLC vs. CC (Air Cargo Complex), Chennai**⁸
- g) **Commissioner Central Excise Commissionerate, Chandigarh-I vs. M/s Ind Swift Lands Ltd.,**⁹;

- (ii) No time limit is prescribed for filing refund claims for duty paid under protest. The second proviso to section 27(1) of the Customs Act categorically provides that the time limit under section 27(1) shall not apply where duty has been paid under protest; and
- (iii) Even with the insertion of the fourth proviso to section 27(1) of the Customs Act with effect from May 11, 2007, it would be incorrect in law to state that a time limit has been prescribed for refund of claims when duty has been paid under protest. In this connection, reliance has been placed on the decision of the Punjab and Haryana High Court in **Malwa Industries Ltd., vs. Union of India**.¹⁰

3. 1997 (89) ELT 247 (SC)

4. 2004 –TIOL-62-CESTAT-DEL

5. 2002 (148) ELT 1243 (Tri.-Kolkata)

6. 2006-TIOL-439-CESTAT-MUM

7. 2011-TIOL-163-CESTAT-BANG

8. 2018 (359) ELT 219 (Tri.-Chennai)

9. 2017–(2)-TMI-23- Punjab and Haryana High Court

10. 2018 (361) ELT 81 (P & H)

13. Shri Sunil Kumar, learned Authorized Representative of the Department has, however, supported the impugned order and made the following submissions:

- (i) The Appellant failed to substantiate that duty was paid under protest by adducing documentary evidence;
- (ii) The refund claims are not barred by limitation only when a specific and valid protest is made. In this connection reliance has been placed to the following decisions:
 - a) **Inchek Tyres Ltd. vs. Union of India and Others¹¹ as confirmed by the Calcutta High Court¹²**
 - b) **Gujarat State Fertilizers & Chem Ltd. vs. Commr. Of C. Ex., Vadodara¹³;**
- (iii) Mere filing of an appeal would not mean that a protest has been lodged. In this connection reliance has been placed on the decision of a learned judge of the Madras High Court in **DCW Ltd. vs. Assistant Commissioner of Customs, Madras¹⁴**, which has distinguished the judgment of the Supreme Court in **Mafatlal Industries Limited**; and
- (iv) The decision of the Punjab & Haryana High Court in **Malwa Industries Ltd** is clearly distinguishable, and in fact the decision of the Chennai Bench of the Tribunal in **Redington India Ltd. vs. Commissioner of Customs, Chennai¹⁵** is applicable.

11. 1978 (2) ELT (J 643)

12. 1987(27)ELT 614(Cal.)

13. 2004 (166) ELT 193 (Tri.-Del.)

14. 2003 (157) ELT 510 (Mad.)

15. 2011 (269) ELT 233 (Tri.-Chennai)

14. The submissions advanced by the learned Counsel for the Appellant and the learned Authorized Representative of the Department have been considered.

15. The issue that arises for consideration in this appeal is as to whether filing of an appeal against an assessment order would itself mean that duty has been paid under protest.

16. The records indicate that the Appellant had imported goods from related parties and had filed Bills of Entry which were assessed and duty was paid after loading the declared invoice value so as to make the value equal to 58% of the global price list of CISCO. Subsequently, after remand the declared price was enhanced to only 46% of the global price list for the years 2000-08. This order was accepted both by the Appellant and the Department. The reduction of the loaded price from 58% to 46% led to the filing of an application by the Appellant for refund of the excess duty paid for the period April 2004 to June 2008. This application which was filed on April 12, 2010 was rejected primarily for the reason that the Appellant had not submitted any evidence to substantiate that duty had been paid under protest and so the refund claim was barred by limitation under section 27(1) of the Customs Act. The appeal filed by the Appellant before the Commissioner (Appeals) was rejected but the Tribunal, in the appeal filed by the Appellant, remanded the matter to the Commissioner (Appeals).

17. The gist of the decision dated April 13, 2016 of the Tribunal is as follows:-

- (i)** Section 27(1) of the Customs Act contemplates that a refund application has to be filed before the expiry of six months from the date of payment of duty by the assessee;
- (ii)** However, in view of the provisions of the second proviso to section 27(1) of the Customs Act, this limitation of six months shall not apply where the duty has been paid under protest;
- (iii)** There is no clear finding by the Adjudicating Authority that duty was paid under protest;
- (iv)** The fourth proviso to section 27(1) of the Customs Act, provides that where the duty becomes refundable as a consequence of judgment, decree, order or direction of the Appellate Authority, Appellate Tribunal or any Court, the limitation of six months shall be computed from the date of such judgment, decree, order or direction. In the present case, the refund application has not been filed as a consequence of any order passed by the Appellate Forum, because the Commissioner (Appeals) merely remanded the matter to the Adjudicating Authority for passing a fresh order;
- (v)** If a duty has been paid under protest, it is the second proviso to section 27(1) of the Customs Act, that would apply, which means that the limitation period of six months for filing a refund application would not apply;

- (vi) Since it could not be substantiated by the Appellant through documentary evidence that duty was paid under protest and a categorical finding has also not been recorded in the order, the matter needs to be remanded to the Adjudicating Authority for passing a fresh order after examining the facts; and
- (vii) The plea of the Appellant that the filing of an appeal before the higher authority itself would amount to payment of duty under protest, will also be considered by the Adjudicating Authority in the light of the decisions to be brought to the notice of the Adjudicating Authority by the Appellant.

18. The Commissioner (Appeals), however, on remand rejected the refund claim holding that;

- (i) The Appellant failed to place any evidence on record from which it can be gathered that the amount of duty was paid by the Appellant under protest;
- (ii) The decisions relied upon by the Appellant to support its contention that filing of an appeal implies that duty was paid under protest would not come to the aid of the Appellant for the reason that none of the decisions cover the period after 2007, when section 27 of the Customs Act was amended by addition of the fourth proviso.

19. To appreciate the rival contentions advanced on behalf of the parties, it would be appropriate to reproduce the relevant provisions of section 27 of the Customs Act:

"Section 27- Claim for refund of duty.-(1) Any person claiming refund of any duty-

(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him,

may make an application for refund of such duty and interest, ' if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months,

from the date of payment of duty and interest, if any, paid on such duty in such form and manner as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person:

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Provided further that the limitation of one year or six months, as the case may be, shall not apply where any duty and interest, if any, paid on such duty has been paid under protest:

xxxxxxx

Provided also that where the duty becomes refundable as a consequence of judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year or six months, as the case may be, shall be computed from the date of such judgment, decree, order or direction."

20. It needs to be noted that the fourth proviso to section 27(1) of the Customs Act was inserted with effect from May 11, 2007 by section 96 of the Finance Act, 2007.

21. A perusal of section 27 (1) of the Customs Act shows that a person claiming refund of duty paid by him in pursuance of an order of assessment, may make an application of refund of such duty to the Assistant Commissioner of Customs before

the expiry of six months from the date of payment of duty. The second proviso to section 27 (1), however, provides that the limitation of six months shall not apply where any duty has been paid under protest. The fourth proviso to section 27 (1) that was inserted with effect from May 11, 2007, provides that where the duty becomes refundable as a consequence of judgment, decree, order or direction of the appellate authority, appellate tribunal or any other court, the limitation of six months shall be computed from the date of such judgment, decree, order or direction.

22. The contention of the Appellant is that the limitation of six months in making an application for refund of duty from the date of payment of duty contemplated under section 27 (1) of the Customs Act would not apply in a case where the duty has been paid under protest. In this connection the submission of the appellant is that mere filing of an appeal against an assessment order implies that the person has protested against the payment of duty.

23. The Department, however, contends that since a formal protest was not lodged by the Appellant, nor the Appellant submitted any documentary evidence to support this contention, the second proviso would not apply and even otherwise, as the refund claim was not filed within six months from the date of the order dated April 23, 2009 passed by the Assistant Commissioner on remand, which is the period

contemplated under fourth proviso to section 27 (1) of the Customs Act, the refund claim was barred by time.

24. Learned Counsel for the Appellant has submitted that the mode of protest against the payment of duty was by way of filing an appeal against the assessment order and if this is considered to be a protest, the limitation of six months provided for would not be applicable since the second proviso to section 27(1) of the Customs Act clearly stipulates that the limitation of six months shall not apply where any duty has been paid under protest.

25. The Constitution Bench of the Supreme Court in **Mafatlal Industries Limited**, in the context of section 11 B of the Central Excise Act, 1944, held that where a person proposes to contest the liability by way of appeal, revision or in the higher courts, he would naturally pay the duty under protest and it is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty. Paragraph 83 of the judgment, which deals with this aspect, is reproduced below:

"83.It is then pointed out by the learned Counsel for the petitioners-appellants that if the above interpretation is placed upon amended Section 11B, a curious consequence will follow. It is submitted that a claim for refund has to be filed within six months from the relevant date according to Section 11B and the expression "relevant date" has been defined in Clause (B) of the Explanation appended to sub-section (1) of Section 11B to mean the date of payment of duty in cases other than those falling under Clauses (a), (b), (c), (d) and (e) of the said Explanation. It is submitted that Clauses (a) to (e) deal with certain specific situations whereas the one applicable in most cases is the date of payment. It is submitted that the appellate/revision proceedings, or for that matter proceedings in High Court/Supreme Court, take a number

of years and by the time the claimant succeeds and asks for refund, his claim will be barred; it will be thrown out on the ground that it has not been filed within six months from the date of payment of duty. We think that the entire edifice of this argument is erected upon an incomplete reading of Section 11B. The second proviso to Section 11B (as amended in 1991) expressly provides that "the limitation of six months shall not apply where any duty has been paid under protest". **Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other aspect. If one reads the second proviso to sub-section (1) of Section 11B along with the definition of "relevant date", there is no room for any apprehension of the kind expressed by the learned Counsel."**

(emphasis supplied)

26. The second proviso to section 11B (1) of the Central Excise Act, 1944 is reproduced below:

"Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest."

27. It is seen that the second proviso to section 11B of the Central Excise Act is identical to the second proviso to section 27 (1) of the Customs Act.

28. Thus, it has to be held that if an appeal is filed against an assessment order, then duty that is paid has to be treated as duty paid under protest and in that case the limitation of six months for filing a refund claim from the date of payment of duty, would not apply.

29. A Division Bench of Haryana High Court in **M/s Ind Swift Lands Limited** also considered the issue as to whether the application filed for refund of duty was barred by limitation

under section 11B(1) of the Excise Act and observed as follows:

"10. The second proviso furnishes a complete answer in favour of the assessee. It states that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty, has been paid under protest. Even assuming that the application for refund of amounts paid in such circumstances, is to be made under section 11B(1), in the present case the application would not be barred by limitation as the amounts were paid under protest. The period of limitation, if any, therefore, would clearly be inapplicable to the assessee. It was not contended before us that any other period of limitation applies and that under such a provision, the claim would be barred nevertheless. **An act, including a payment can be made under protest in several ways. For the act to be under protest, it is not necessary that it be accompanied by the very words "under protest" whether an act is performed under protest or not must be determined on the basis on which it is performed, if the conduct indicates that it is not voluntary and is done out of compulsion it is under protest** even within the meaning of these words in the second proviso to section 118 (1) of the Act which we will refer to shortly."

(emphasis supplied)

30. The Tribunal in **M/s Hutchison Max Telecom Pvt. Ltd., Bayshore Glass Trading Pvt. Ltd., Parle Biscuits Pvt. Ltd., Big Apple** and **RFB Rig Corporation LLC** also took the same view.

31. Learned Authorised Representative of the Department has, however, placed reliance upon the decision of a learned Judge of the Madras High Court in **DCW Limited**. After reproducing paragraphs 83, 85, 86 of the Constitution Bench judgment of the Supreme Court in **Mafatlal Industries**, the learned judge observed as follows:

"Their lordships of the Supreme Court have held that where a person proposes to contest his liability by way of appeal, revision or in the higher Courts, he would naturally pay the duty under protest and it is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification and the assessee need not particularise the grounds of protest and it is open to him to say that the duty is not exigible according to law and the acknowledgement of the letter of protest shall be the proof to show that duty had been paid under protest and in that case, the period of limitation of six months will have no application to him. The Apex Court has further held that where the duty is paid under the orders of Court pending an appeal/reference/writ petition, it will certainly be a payment under protest and in such a case it would not be necessary to lodge the protest.

10.Admittedly, in the present case, the petitioner has not made the payment of duty under protest and in that case, the period of limitation of six months will apply to the petitioner and the claim not being made within a period of six months from the date of payment has been rightly rejected by the respondent."

32. The Constitution Bench of Supreme Court in **Mafatlal Industries** clearly held that where a person proposes to contest his liability by way of appeal, he would naturally pay the duty under protest and it is difficult to imagine that duty would be paid without protest even when he contest the levy of duty. This apart, a Division Bench of the Madras High Court in **Commissioner of C. Ex. Chennai-II vs. Electro Steel Castings Limited**¹⁶ followed the Constitution Bench judgment of the Supreme Court in **Mafatlal Industries** and held that the limitation period for filing a refund claim would not be applicable if an appeal has been filed since it would be a case where duty has been paid under protest. The relevant portion of the judgment is reproduced below:

16. 2014 (299) ELT 305 (Mad.)

"5. Thus, the determination of substantial question of law involved herein depends upon the question of limitation to make any refund claim, which intturn depends upon the mode of payment of duty under protest or not under protest? While according to the Revenue, the payment of duty is without any protest, the assessee's categorical stand is that it is deemed to be paid under protest.

6. Both the Revenue and assessee relied on the same decision of the Apex Court in the case of *Mafatlal Industries Ltd.* reported in [1997 \(89\) E.L.T. 247](#) (S.C.) in respect of their respective contentions whether the refund claim was made under protest or not.

7. Though it is sought to be contended on the side of the Revenue that the decision of the Supreme Court in the case cited above is more applicable to the case of the Revenue, we are not inclined to accept the same. The Apex Court in para 83 under an identical situation, dealt with the same issue, wherein also payment was made, when the assessee has been contesting the levy of duty for the earlier period. The Supreme Court is compelled to say that-

"Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other aspect..."

That being the categorical observation of the Supreme Court, the same is squarely applicable to the facts of the present case in favour of the assessee, wherein also, the payment of duty was made only during the pendency of appeal against very levy of duty for the earlier period.

9. Thus, the facts involved in both the cases decided by the Supreme Court were identical and the Supreme Court, while dealing with the issue relating to period of limitation, uniformly held that no limitation was applicable to the payment made under protest. The Hon'ble Supreme Court in the earlier judgment clearly observed that the payment made, when the assessee has been challenging the earlier levy of duty, is deemed to be under protest and not otherwise. Hence, the combined appreciation of both the cases decided by the Supreme Court would lead to an irresistible inference that the payment made herein is also deemed to be under protest and no limitation is applicable and the claim is maintainable and is rightly decided by the CESTAT."

33. The Commissioner (Appeals) has distinguished the aforesaid decisions relied upon by learned counsel for the Appellant, including the Constitution Bench Judgment of the Supreme Court in **Mafatlal** only for the reason that none of

the judgments cover the period after 2007, when the fourth proviso to section 27 (1) of the Customs Act was inserted.

34. The issue that was required to be decided by the Commissioner (Appeals) was whether in terms of the second proviso to section 27 (1) of the Customs Act, the limitation of filing the refund application within six months from the date of payment of duty would be applicable if an appeal had been filed against the order of assessment as that may amount to payment of duty under protest. The Commissioner (Appeals) was not required to examine whether the fourth proviso to section 27 (1) of the Customs Act would apply or not. The fourth proviso to section 27 (1) of the Act deals with an entirely different situation where the duty becomes refundable as a consequence of a judgment, decree, order or direction of the appellate authority, the appellate tribunal or any court. In such a situation, the limitation of six months shall be computed from the date of such judgment, decree or direction.

35. It needs to be noted that application filed by the Appellant for refund of duty was not as a consequence of any judgment, decree, order or direction of the appellate authority, appellate tribunal or any court.

36. In fact, the Tribunal in the present case, while remanding the matter to the Commissioner (Appeals) had examined the second proviso as also the fourth proviso to section 27(1) of the Customs Act and had distinguished the two. The Tribunal held that it is the second proviso to section

27 (1) of the Customs Act that would be applicable and not the fourth proviso and so all that the Commissioner (Appeals) was required to decide was whether duty had been paid under protest or not since an appeal against the assessment order had been filed. The Commissioner (Appeals) clearly misunderstood the direction issued by the Tribunal and based his order on the fourth proviso to section 27 (1) of the Act.

37. Thus, for all the reasons stated above, it is not possible to sustain the order passed by the Assistant Commissioner (Appeals). It is, accordingly, set aside and the application filed by the Appellant under section 27 (1) of the Custom Act is allowed with all consequential benefits. The appeal, therefore, stands allowed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(C L MAHAR)
MEMBER (TECHNICAL)