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**CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066**
**EXCISE APPEAL BRANCH**

Appeal No. E/3181/2004-3183/2004 Date 01/04/2008
E/COD/274/04

Assistant Registrar
C.E.S.T.A.T. New Delhi

To :
C.C.E. INDORE (M.P.)

THE COMMISSIONER OF CENTRAL EXCISE, P.B.-10,
MANIK BAGH PALACE, INDORE (M.P.)
C.C.E. INDORE (M.P.)

Appellant

Vs

M/S LAKHANPAL NATIONAL LTD. Respondent

MISC ORDER NO. 390/08-EX

I am directed to transmit herewith a certified copy of **Final order No. 111-13/08-EX 2008 Excise** dated 17-3-08

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

**Copy to :**

1. Respondent

M/S LAKHANPAL NATIONAL LTD.

M/S LAKHANPAL NATIONAL LTD. PLOT NO.-112.
INDUSTRIAL AREA, SECTOR-III, PITHAMPURA,
DIST. DHAR, M.P.
454775

2. Adv. / Consult SH. TUSHAR JARWAL, ADV.,
R. NO. 405-6, 4TH FLOOR
WORLD TRADE CENTRE,
BARAKHAMBA LANE, N. DELHI-1
3. C.D.R.
4. ~~J.D.R.~~
5. Bar association. CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, marg. 43, saket, New
7. M/s Centax Publictions (P) Ltd., 1512-E, Bhishm Pitamah
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301
9. R.Venkatraman Constt. 44-B. S.Suncity, Ghaziabad -
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh,
12. Co. Law Institution
13. TAX INDIA, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(Excise Appeal Branch)

P.T.O

1 M/S LAKHANPAL NATIONAL LTD.
THE COMMISSIONER OF CENTRAL EXCISE. MANIK BAGH PALACE, P.B.-10, INDORE
2 M/S LAKHANPAL NATIOMAL LTD.
THE COMMISSIONER OF CENTRAL EXCISE. PLOT NO 112, INDUSTRIAL AREA, SECTOR III, PITHAMPUR, DIST DHAR,

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**West Block No. 2, R.K. Puram, New Delhi – 110 066.**
**Principal Bench, New Delhi**

**COURT NO. II**
**Excise Appeal No. 3181-3183 of 2004 and COD Application No. 274 of 2004**

[Arising out of the Order-in-Appeal No. IND-I/124-126/2004 dated 18/03/2004 passed by The Commissioner (Appeals-I), Customs & Central Excise, Indore. ]

For Approval and signature :
**Hon'ble Shri S.S. Kang, Vice President**
**Hon'ble Shri Rakesh Kumar, Member (Technical)**

| | | | |
|---|---|---|---|
| 1. | Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | : | no |
| 2. | Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | : | no |
| 3. | Whether their Lordships wish to see the fair copy of the order? | : | yes |
| 4. | Whether order is to be circulated to the Department Authorities? | : | no |

CCE, Indore — Appellant

Versus

M/s Lakhanpal National Ltd. — Respondent

**Appearance**

Shri C.S. Rajput, Authorized Representative (JDR) – for the appellant.

Shri Tushar Jarwal, Advocate – for the Respondent.

CORAM:**Hon'ble Shri S.S. Kang, Vice President**
**Hon'ble Sh. Rakesh Kumar, Member (Technical)**

**DATE OF HEARING : 17/03/2008.**

Final Order No. 111-13/08-Ex Dated : 17-3-08
Misc order No. 390/08-Ex

**Per. S.S. Kang :-**

Heard both sides. Revenue filed these appeals against the impugned orders, whereby refund claim ~~were~~ filed by the respondent were allowed. Brief facts of the case are that the respondents were clearing goods under the provisional assessment orders and the assessments were finalized in the year December 1997. The respondents filed refund claims as consequential relief after finalization of the assessment. Commissioner (Appeals) in the impugned order held that respondents are entitled for the refund and provisions of unjust enrichment are not applicable as the assessment was finalized in the month of December 1997 and the provisions of unjust enrichment under Rule 9B of Central Excise Rules were introduced w.e.f. 25/06/99.

2. The contention of revenue is that refund claims are subject to the principle of unjust enrichment and

Commissioner (Appeals) has wrongly held that the same is not applicable in the present case.

3. We find that the goods were cleared under provisional assessment orders and assessments were finalized in the month of December 1997. with effect from 25/06/99 the bar of unjust enrichment is incorporated in Rule 9B of Rules. We find this issue is now settled by Hon'ble Supreme Court in the case of **Commissioner of Central Excise, Chennai vs. T.V.S. Suzuki Ltd.** reported in **2003 (156) E.L.T. 161 (S.C.).** The Hon'ble Supreme Court held that provisions of sub-rule (5) of Rule 9B of erstwhile Central Excise Rules, 1944 not retrospective in operation and before the amendment ~~amount~~ of Rule, bar of unjust enrichment is not applicable. The Hon'ble Supreme Court held as under :-

> "3. In order to get over the situation arising under *Mafatlal Industries Ltd.* (supra) vide notification No. 45/99-C.E. (N.T.) dated 25/06/99, 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

finalization 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.

5. 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. 25/6/99, 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 appellant 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 appellant

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."

4. This view was further approved by Hon'ble Supreme Court in the case of **Commissioner of Central Excise, Mumbai – II vs. Allied Photographics India Ltd.** reported **in 2004 (166) E.L.T. 3 (S.C.).** Hon'ble Supreme Court held as under :-

> "14. As stated above, Para 104 of the judgment in the case *Fafatlal Industries Ltd.* (supra) states that if refund arises upon finalization of provisional assessment, Section 11B will not apply. Para 104 of the said judgment does not deal with payment under protest. In the light of what is stated herein, we may now consider the judgment of this Court in the case *Sinkhai Synthetics & Chemicals Pvt. Ltd.* (supra). In that matter, the assessee was a manufacturer. The assessee claimed exemption which was denied by the Department. The assessee went in appeal to CEGAT. Pending appeal,

assessee paid excise duty under protest. The assessee succeeded before the CEGAT and claimed refund on 17/1/1991. Refund was denied by the Department. Therefore, it was a case of payment of duty under protest. However, in the said decision, this Court applied Para 104 of the judgment of the Constitution Bench in the case of *Mafatlal Industries Ltd.* (supra), which with respect, had no application. As stated above, Para 104 does not deal with refund of duty paid under protest. As stated above, there is a difference under the Act between payment of duty under protest on one hand and refund consequent upon finalization of provisional assessment on the other hand. This distinction is missed out, with respect, by the judgment of this Court in the case of *Mafatlal Industries Ltd.* (supra). We may also point out that the judgment in the case of *Sinkhai Synthetics & Chemicals Pvt. Ltd.* (supra) is based on the concession made by the Counsel appearing on behalf of the Department. That judgment is, therefore, per incuriam. Learned counsel for the respondent herein placed reliance on the judgment of this Court in the case of *TVS Suzuki Ltd.* (supra). In that case, application for refund was filed. This was on completion of final assessment. On 09/07/1996, the Department issued a show cause notice as to why the refund claim should not be rejected for non-compliance of Section 11B. By order dated 17/7/1996, the refund claim was rejected on the ground that it was beyond limitation. On appeal, the Commissioner (Appeals) observed that the bar of unjust enrichment was not applicable as the assessee claimed refund consequent upon final assessment. He allowed the refund claim. CEGAT agreed with the view of Commissioner (Appeals). Before this Court, the Department conceded rightly that in view of Para 104 of the judgment of this Court in *Mafatlal Industries Ltd.* (supra), bar of unjust enrichment was not applicable in cases of refund consequent upon adjustment under Rule 9B (5). The judgment of this Court in the case of *TVS Suzuki Ltd.* (supra), therefore, supports the view which we have taken herein above that refund consequent upon finalization of provisional assessment did not attract the bar of unjust enrichment."

5. ~~As~~ In the present case, the assessment were finalized prior to amendment to Rule 9B and refund claim was filed prior to amendment. Therefore, in view of above decisions we find no merit in the appeals and same are dismissed.

(Dictated and pronounced in open court)

**(S.S. Kang)**
**Vice President**

**(Rakesh Kumar)**
**Member (Technical)**

PK