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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/1225/2006 - EX[DB] Date 01/01/2010

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

To :
C.C.E. INDORE
MANIK BAGH PALACE, POST BOX NO. 10, INDORE
452001 (M.P.)
C.C.E. INDORE Appellant

Vs

M/S INDORAMA EXPORTS Respondent

I am directed to transmit herewith a certified copy of **Final order No. 1407/ 2009 EX[DB]** dated 29-12-09 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 INDORAMA EXPORTS
   51-B & C INDUSTRIAL AREA, SECTOR-III, PITHAMPUR
2. Adv. / Consult
   MR.RAMESH NAIR
   LAKSHMI VIHAR, AG- 192, SCHEME NO. 54, VIJAYNAGAR, INDORE(MP)
3. C.D.R
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. Director Publications, Customs, Excise. I.P. Estate, New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16. Office Copy
17. Guard file

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI, PRINCIPAL BENCH NEW DELHI

Excise Appeal No.1225 of 2006-Excise Branch

[Arising out of Order-in-Appeal No.IND-I/66-67/2006 dated 15.02.2006 passed by the Commissioner of Central Excise (Appeals), Indore]

Date of Hearing/ Decision:26.11.2009

For approval and signature:

Mr. M. Veeraiyan, Member (Technical)
Mr. D.N. Panda, Member (Judicial)

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1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :

3. Whether Their Lordships wish to see the fair copy of the Order? :

4. Whether Order is to be circulated to the Departmental authorities? :

CCE, Indore ...Appellants
(Rep. by Shri S.R. Meena, SDR)

Vs.

M/s. Indorama Exports ....Respondent
(Rep. by Shri Ramesh Nair and Shri Alok Barthwala, Advocates)

CORAM: **Hon'ble Mr. M. Veeraiyan, Member (Technical)**
Hon'ble Mr. D.N. Panda, Member (Judicial)

Final Order No. 1407/09-EX /Dated:26.11.2009

<u>Per D.N. Panda:</u>

Revenue has come in appeal against the Order-in-Appeal dated 15.02.2006 passed by the ld. Commissioner (Appeals) deciding two refund claims of Rs.45,65,419/- and Rs.92,28,482/- relating to two different periods on the ground of limitation as well as bar of unjust enrichment.

2. Refund of Rs.45.65.419/- is relating to the period March. 2000 to October. 2000. Respondent had made payments of such sum to exchequer in December. 2000, February. 2001 and March. 2001. So far as refund claim of Rs.92.28.482/- is concerned. that amount relates to the period from November. 2000 to March. 2003. Ld. Commissioner on the basis of the evidence of Chartered Accountant's certificate. Balance sheet and Ledger Accounts came to the conclusion that the Respondent having pursued its claim for refund before various appellate forums. there was payment of above amounts made under protest and such act was treated as recei vables by the Respondent. Upon examination of the record. he came to the conclusion that when the Respondent was pursuing the dispute before the Apex court. it was certainly protesting the payment for which those two amounts appeared in its Balance Sheet ~~for~~ as receivable from Government. and such exhibition by the Balance Sheet and the Ledger Accounts brings the case of the Respondent to the scope of the protest for counting limitation from the date of ending of the litigation before the Apex court. In paragraph-5 of his order. ld. Commissioner has elaborately dealt with refund claim of Rs.45.65.419/-. In para-6 of the appellate order. he dealt with the similar claim of Rs.92.28.482/-. In both the paragraphs. he has explained how the limitation was adhered by

making application dated 27:04.2005 to the Authorities below consequent upon Apex court's decision on 15.04.2005 and resolution of the dispute gave rise to the refund claim made by Respondent. He has also very categorically narrated that the protest was all along existing for the refund claim for which that is not time barred. In these two paragraphs, he elaborately explained how the Respondent has also not been unjustly enriched by the claims of refund.

3. Ld. DR on behalf of Revenue submits that adjudication was done properly and protest ended soon after the first appeal was concluded and he relied on the decision of the Tribunal in the case of CCE, Mumbai Vs. Motor Industries Co. Ltd. 2004 (170) ELT 439 (Tribunal-Mumbai). He accordingly pleads that when the protest ended, the litigation of the Apex court is not material to decide the limitation. He supports the order of the adjudication even on the ground of bar of unjust enrichment submitting that the Respondent was collecting excise duty for sometime and the grounds of the revenue that necessary documents showing the sale bills were not produced for consideration. He prays that the order passed by the ld. Commissioner is to be reversed and the adjudication order to be restored.

4. Ld. Counsel, Shri Ramesh Nair on behalf of Respondents submits that examination of both of the refund claims was done by the ld. Commissioner (Appeals) and that too such examination was done on

touch stone of law laid down by the Apex court in Mafatlal Industries Vs. Union of India reported in 1997 (89) ELT 247 (SC) in para 83 to 84. Respondent's case was that payment of duty was made under protest and such protest was existing till decision of the Hon'ble Supreme Court. Therefore, ld. Commissioner has rightly held that bar of limitation shall be calculated from 15.04.2005 since on that date the Apex court decided the *lis* between the parties.

5. Ld. Counsel points out that unjust enrichment aspect was entirely examined even by the ld. Adjudicating Authority, who has depicted the document (certificate of Chartered Accountant) examined by him in para-13 of the Order-in-Original in respect of the refund order relating to Rs.92,28,482/-. Similarly such document was before him as appearing in para-13 of the order in original relating to refund of Rs.45,65419/-. He submits that the ld. Appellate Authority has gone through the Ledger Accounts of the Respondent, Balance Sheet and various other documents annexed to the Balance Sheet to hold that the Respondent had not passed on duty burden to its buyers. The Respondent had also proved its conduct depicting the respective amounts under Schedule 11 of the Audited Statement of Accounts appearing at page 36 of such statement and that reflects conduct of the Respondent in respect of amounts disputed by Revenue, which was not burdened to the consumers. Respondent has

discharged its burden of proof for which presumption in favour of Revenue was negated by the learned Appellate authority. Therefore, on both the grounds i.e. limitation and unjust enrichment, the Respondent succeeded before the learned Appellate authority below. Today, Revenue having no material to interfere to the first Appellate authority's order, that order should sustain without any interference.

6. Heard both sides before the lunch break and after lunch break and thorough examination of record on the issue of limitation as well as bar of unjust enrichment was made. We are fully satisfied that the ratio laid down by the Apex court in para 83 to 86 in the case of Mafatlal judgement reported in 1997 (89) ELT 247 (SC) is applicable to the case in hand. For the convenience of reading and appreciation of the merits of case, we reproduce those paragraphs hereunder:-

> "**83.** for the It is then pointed out by the learned Counsel 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 n 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.

84. prescribes the It was then submitted that Rule 233B which procedure to be followed in cases where duty is paid under protest requires the assessee to state the grounds for payment of duty under protest and that it may well happen that the authority to whom the letter of protest is submitted may refuse to record it, if he is not satisfied with the grounds of protest. In our opinion, the said apprehension is not well-founded. Sub-rules (1), (2) and (3) of Rule 233B read as follows :

"**RULE 233B. Procedure to be followed in cases where duty is paid under protest.** - (1) pay duty under protest Where an assessee desires to he shall deliver to the proper officer a letter to this effect and give grounds for payment of the duty under protest.

On (2) an receipt of the said letter, the proper officer shall give acknowledgement to it.

The (3) provisions of the sub-rule acknowledgement so given shall, subject to the (4), be the proof that the assessee has paid the duty under protest from the day on which the letter of protest was delivered to the proper officer."

85. mention the The rule no doubt requires the assessee to "grounds for payment of the duty under protest" but it does not empower the proper officer, to whom the letter of protest is given, to sit in judgment over the grounds. The assessee need not particularise the grounds of protest. It is open to him to say that according to him, the duty is not exigible according to law. All that the proper officer is empowered to do is to acknowledge the letter of protest when delivered to him - and that acknowledgement shall be the proof that the duty has been paid under protest. A reading of the rule shows that the procedure prescribed therein is evolved only with a view to keep a record of the payment of duty under protest. It is meant to obviate any dispute whether the payment is made under protest or not. Any person paying the duty under protest has to follow the procedure prescribed by the Rule and once he does so, it shall be taken that he has paid the duty under protest. The period of limitation of six months will then have no application to him.

86. is paid We may clarify at this stage that when the duty under the orders of Court (whether by way of an order granting stay, suspension, injunction or otherwise) pending an appeal/reference/writ petition, it will certainly be a payment under protest; in such a case, it is obvious, it would not be necessary to lodge the protest as provided by Rule 233B. "

7. On careful reading of the aforesaid ratio laid down by Apex Court, we are of the view that decision was made under Rule 233 B of the Central Excise Rules 1944. But such ratio holds the field for the present case and undisputed till today. Following judgement of Apex Court in the case of Dena Snuff (P) Ltd. reported in 2003 (157) ELT 500 (SC) limitation begins when lis ends. For the convenience of reading and appreciation of the principles of limitation laid down, we reproduce para-5 of the said judgement as under:-

> 5. of the As far as the first submission is concerned, we are view that the Tribunal's appreciation of the relevant paragraph in *Mafatlal Industries* (supra) was correct. The "cause of action" of the appellant would arise only after the final dispute regarding the classification list had been settled by this Court. That was done as recently as on 28-8-2003. The application for refund by the appellant was therefore premature. We have noted the proviso to sub-section (1) of Section 11(B) which says that the period of limitation of one year prescribed under sub-section (1) will not apply in case duties are paid under protest. The question then is from which date will the period of limitation start to run? It appears on the basis of the paragraph of *Mafatlal Industries* decision which has been relied upon by the Tribunal it would have to be from the final decision in the assessee's own case.

8. In view of the law laid down by the Apex court in the case of Mafatlal Industries and Dena Snuff (P) Ltd., we are unable to agree with Revenue's contention on limitation while appreciating that the decision made by Tribunal in CCE, Ahmedabad Vs. Plas Pack Industries- 2004 (170) ELT 293 (Tribunal-Mumbai) was on different context.

9. When the law laid down by the Apex court itself decides the limitation issue in the manner indicated as above, we have nothing to say more on such issue but to allow the order of the learned first Appellate Authority to remain untouched on such count.

10. So far as the point of unjust enrichment is concerned, it has been a followed practice by Tribunal for some time past to rely on the Chartered Accountant's certificate and that has been followed by the Tribunal in the case of MRF Ltd. Vs. CC (Port), Kolkata reported in 2008 (225) ELT 246 (Tribunal-Kolkata). But we are not halting at this stage. We have still gone on examining the issue carefully and understand the manner how such issue was dealt by Ld. Commissioner (Appeals) in para 5 and 6 of his order. He had examined the Balance Sheet which exhibits that the above amount . . were shown as receivables. That is also patent from page 20 of Annexure to Balance Sheet produced today before us for our perusal. We have taken that to record to appreciate the extent of examination made by the ld. Commissioner (Appeals). When the Appellate Authority below has examined the Ledger Account and has perused the details given in the ledger on both the claims and Chartered Accountant's certificate is not contradicted. Such fact, nothing wrong appears to have been done while deciding the issue in favour of the Respondent. Therefore, without disturbing the order of learned Appellate Authority

below, we allow that to sustain even on the point of unjust enrich ment. In view of our observations and finding made aforesaid, Revenue's appeal is dismissed.

Order dictated & pronounced in open Court on 26.11.2009.

(M. Veeraiyan)
Member (Technical)

(D.N. Panda)
Member (Judicial)

Ckp.