

GRAM : CEGCANAL

REGISTERED/A.D

THE CUSTOMS, EXCISE & GOLD (CONTROL) APPELLATE TRIBUNAL,

West Block No. 2, R.K. Puram, New Delhi - 110066.

Appeal No. E/1029/2000-NB(SM) BENCH NB(SM)

Dated : 30/1/2001

CEGAT  
NEW DELHI  
To,

CCE Jaipur

In the matter of :

CCE Jaipur

Appellant

vs.

M/s Govind Rubber Ltd.,

Respondent

I am directed to transmit herewith a certified copy of Final Order No. A/138/2001-NB(S)  
Dated : 21-12-2000 passed by the Tribunal under Section 35-C(1) of Central Excise  
& Salt Act, 1944/Section 129 (B) of the Customs, Act, 1962.

Copy to : M/s Govind Rubber Ltd.,  
1. Govind Nagar, Phase-III  
Bhiwadi. (Raj.)

Asstt. Registrar  
NB(SM)

2. CCE/CE/(Appeal) Jaipur  
3. Chief Commissioner of Central Excise / Customs. Jaipur  
4. Adv./Consult. Shri C.D. Banga, Adv.  
40 Respondent

5. S.D.R
6. JCDR
7. Bar Association, CEGAT, New Delhi
8. Library, CEGAT, New Delhi
9. Director (Review), C.B.E.C. North Block, New Delhi
10. Guard File.
11. M/s Deeparchic Publications, M-93, Marg-46, Saket, New Delhi.
12. M/s Centax Publications (P) Ltd., 1512-E, Bhisim Pitamah Marg, opp. Sachdeva P.T. College of Defence Colony, New Delhi-110003
13. M/s Lex Site Com. Ltd., Mumbai
14. Office Copy
15. M/s cen-cus publication.

Asstt. Registrar

**In the Custom, Excise & Gold (Control) Appellate Tribunal  
New Delhi**

APPEAL NO. E/1029/2000-NB(SM) OF 19 (.....)

ARISING OUT OF ORDER IN ORIGINAL/APPEAL NO.

423 (KDT)CE/JPR-I/99 DATED 17.12.99

PASSED BY the Commissioner (Appeals)

Customs & Central Excise, Jaipur

Date of decision 21.12.2000

Commissioner of Central Excise, Jaipur APPELLANT (S)

Represented by Sh./Smt. S.C. Pushkaran, JDR

**VERSUS**

Govind Rubber RESPONDENT (S)

Represented by Sh./Smt. C.D. Banga, Advocate

**CORAM:**

Shri P.S. Bajaj

Member (Judicial)

To be referred to the Reporter or not?  
FINAL ORDER NO. A/138/01/NB(CE/m)

Per P.S. Bajaj

This appeal has been filed by the Revenue against the Order-in-appeal dated 17.12.99 passed by the Commissioner (Appeals) vide which he had reversed the Order-in-original dated 17/18.8.99 of the Deputy Commissioner who held the claim of the

respondents for the refund of duty and penalty amount as time barred.

2. The fact giving rise to this appeal, may briefly be stated are as under:

3. The respondents are engaged in the manufacture of tyres and tubes. A demand of Rs.3,94,000/- was confirmed against them by the Assistant Commissioner, besides the imposition of penalty of Rs.5,000/-, vide order-in-original dated 17.3.97 for having availed the modvat credit illegally. However, in appeal against that order by the respondents, the Commissioner (Appeals) allowed them credit of Rs.2,97,350/- and disallowed credit of only Rs.96,650/- and also reduced the penalty amount of Rs.5,000/- to Rs.4000/- vide order dated 31.3.98. The respondents has deposited Rs.96,650/- vide debit entry No. 55 dated 16.4.98 in RG 23 A Part II. They also deposited penalty amount of Rs.4,000/- vide TR 6 dated 18.4.98. They however subsequently challenged the order of the Commissioner (Appeals) before the Tribunal and the Tribunal accepted their appeal and reversed the order of the Commissioner (Appeals) vide final order dated 18.12.98. Consequently, the respondents filed claim for refund of Rs.1,00,650/- which included the penalty amount of

Rs.4,000/- on 9.2.99. The Deputy Commissioner who adjudicated the refund claim, held the same to be time barred for having not filed within six months from the date of payment vide order in original dated 17/18.9.99. The respondents challenged this order of the Deputy Commissioner, before the Commissioner (Appeals) who reversed the same by holding that the respondents were entitled to credit back the modvat amount of Rs.96,650/- in RG 23 A Part II and refund of penalty amount of Rs.4,000/- in terms of order of the Tribunal dated 18.12.98.

3. The Revenue has come in appeal before the Tribunal against the above said Order-in-appeal of the Commissioner (Appeals).

4. I have heard Shri S.C.Pushkaran, JDR for the revenue and Shri C.D.Banga, advocate for the respondents.

5. The main ground on which the Revenue has contested the validity of the impugned order in appeal is that the refund claim of the respondents was required to be considered only under Section 11 B of the Act as per ratio of law laid down by the Apex Court in Mafatlal Industries vs. Union of India reported in 1997 (89) ELT 247 (SC) but the Commissioner (Appeals) had failed to do so. It has been mentioned in grounds of appeal that as per

provisions of Section 11B of the Act, refund claim was required to be filed within six months from the date of payment and that this period of limitation was not applicable only in those cases where the duty was paid by the assessee 'under protest' or under the order of the ~~Court~~ <sup>Court</sup> ~~Council~~/Tribunal. The Revenue has reproduced paras 83 and 85 of ~~the~~ <sup>the</sup> judgement of the Apex Court in Mafatlal Industries case (supra) in the grounds of appeal. Those paras read as under:

83. Where a person proposes to contest his duty liability by way of appeal revision or in the higher Court, he would naturally pay the duty, whenever he does, under protest".

85. "Any person paying the duty, under protest has to follow the procedure prescribed by Rule, i.e. Rule 233 B ibid, and once he does so, it shall be taken that he has paid the duty under protest".

6. But keeping in view the facts and circumstances of the case in hand, which are not much in dispute, the ratio of the law laid down by the Apex Court in Mafatlal Industries case relied upon by the Revenue, is of no help to them. Admittedly, the respondents initially availed modvat credit of Rs.3,94,000/-, but the same was

disallowed to them by the ~~Deputy~~<sup>Asstt</sup> Commissioner vide order dated 17.3.97 and even penalty of Rs.5,000/- was also imposed on them on the ground that they took the modvat credit illegally. That order of the ~~Deputy~~<sup>Asstt</sup> Commissioner was modified in appeal by the Commissioner (Appeals) who disallowed modvat credit of only Rs.96.650/- and allowed of the balance amount of Rs.2,97,350/- and also reduced the penalty amount of Rs.5,000/- to Rs.4,000/-. The respondents, complied with that order of the Commissioner (Appeals) by making debit entry of Rs.96,650/- in the RG 23 A Part II vide debit entry No. 55 dated 16.4.98 and also deposited the penalty amount. But they did not accepted that order of the Commissioner (Appeals), rather challenged the same before the Tribunal by filing the appeal. It also remains undisputed that the Tribunal vide Final Order dated 18.12.98 allowed the appeal of the respondents in toto by reversing the order of the Commissioner (Appeals). Therefore keeping in view all these facts, the debit entry of Rs.96,650/- and deposit of the penalty amount of Rs.4,000/- by the respondents was not voluntary but under the order of the Commissioner (Appeals), before whom they challenged the order of the ~~Deputy~~<sup>Asstt</sup> Commissioner. They even did not accept the order of the

Commissioner (Appeals) and challenged the same before the Tribunal. On acceptance of the appeal by the Tribunal on 18.12.98 the respondents became legally entitled to credit back the amount of Rs.96,650/- in the RG 23 A Part II wherein they made the debit entry not volunarily, but under the order of the Commissioner (Appeals). They also became entitled to the refund of penalty amount of Rs.4000/- as the same was deposited by them under the orders of the Commissioner (Appeals).

7. The plea of the Revenue that while making a debit entry and depositing the penalty amount the respondents were required to lodge the protest in terms of Rule 233 (B) of the Rules and for having not done so, the payment could not be said to had been made by them under protest and as such period of six months prescribed by Section 11B of the Act for claiming the refund of the duty from the date of payment, was applicable, cannot be at all accepted. The apex Court in Mafatlal Industries case (supra) on which reliance has been placed by the Revenue, in para 86 of the judgement had observed as under:-

We may clarify at this stage that when the duty is paid under the orders of Court (whether by way of an order granting stay, suspension, injunction or

otherwise) pending on appeal/  
reference/writ petition, it will  
certainly be a payment under protest; in  
such as case, it is obvious, it would  
not be necessary to lodge the protest as  
provided by Rule 233 B."

7. Even the observations made by the Apex  
Court in para 83 of the judgement which had been  
referred by the Revenue in the grounds of appeal  
and reproduced above, also help the respondents in  
this case. In that para also, it had been  
observed that "where the person propose to contest  
its duty liability by way of appeal or revision or  
in the higher court, he would naturally pay the  
duty whenever he does under protest".

Therefore, keeping in view the above  
observations of the Apex Court in paras 83 and 86  
of the judgement in Mafatlal Industries case  
(supra) it can be concluded without any hesitation  
that the debit entry of Rs.96,650/- in the RG 23 A  
Part II was made and penalty amount of Rs.4000/-  
was deposited by the respondents, under protest  
under the order of Commissioner (Appeals) as  
they proposed to contest the order of the  
Commissioner (Appeals) under which they were  
required to make the debit entry and pay the  
penalty amount in question. Therefore, the bar of

limitation under 11 B of the Act could not be invoked against them when they filed their claim for refund of modvat and penalty amount, they applied for the refund on 9.2.99 within less than two months of passing of order by the Tribunal on 18.12.99. Therefore the impugned order of the Commissioner (Appeals) holding their claim not to be time barred, cannot be in any manner said to be bad in law. His order is rather perfectly valid and in consonance with the law laid down by the Apex Court in Mafatlal Industries case (supra). Consequently, there is no merit in the appeal of the Revenue and the same is dismissed.

( Pronounced in Court )

( P.S. Bajaj )  
Member(Judicial)

Dt: 21.12.2000  
ss