
(2013) 06 MAD CK 0015

In the Madras High Court

Case No : C.M.A. No. 3901 of 2005 and C.M.P. No. 19325 of 2005

Commissioner of C. EX., Chennai-II

APPELLANT

Vs

Electro Steel Castings Ltd.

RESPONDENT

Date of Decision : 27-06-2013

Acts Referred:

Citation : (2014) 299 ELT 305 : (2014) 25 GSTR 524

Hon'ble Judges : K.B.K. Vasuki, J;Chitra Venkataraman, J

Bench : Division Bench

Judgement

K.B.K. Vasuki, J.—This appeal is filed by the Revenue against the order passed by the Customs, Excise and Service Tax Appellate

Tribunal (2005 (186) ELT 349), raising the following substantial question of law:

Is CESTAT correct in holding that the assessee's claim will not fall under the jurisdiction of the period of limitation as stipulated in Section 11B of

the Central Excise Act, 1944 during the relevant period (six months) since the issue is after the off shoot of Order-in-Appeal passed in favour of

the assessee, whereas the Hon''ble Apex Court in the case of M/s. Dena Snuff Pvt. Ltd. v. The Commissioner of Central Excise, Chandigarh

reported in 2003 (157) E.L.T. 500 (S.C.) has held 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 Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, which has been relied upon by

the Tribunal, it would have to be from the final decision in the assessee's own case?

The assessee/first respondent-company is engaged in the manufacture of cast iron spun pipes falling under CSH 7303.00. The assessee, while calculating the assessable value, did not include the profits earned on account of freight charges for the period from December, 1994 to September, 1995. In pursuance of the same, adjudication proceedings was initiated against the assessee. During the adjudication proceedings, the assessee filed a protest letter under Rule 233B on 7-12-1994. After due process of law, the Additional Commissioner passed an order on 17-10-1997, thereby the demands raised in the show cause notice for the period from March, 1994 to September, 1995 was confirmed. Aggrieved by the same, the assessee preferred an appeal before the Commissioner of Central Excise (Appeals).

2. The appeal preferred by the assessee before the Commissioner of Central Excise (Appeals) for the earlier period was disposed of on 30-7-

1998, thereby setting aside the order of the Assessing Officer. On the strength of such order, the assessee preferred a refund claim for refund of

the duty paid during the period from December, 1994 to September, 1995 and the same was ordered by the Assistant Commissioner vide letter

dated 5-10-1999 on a sum of Rs. 3,22,897/-. During the pendency of the appeal before the Commissioner of Central Excise (Appeals), the

assessee paid the duty on freight charges for the subsequent period from 30-10-1995 to 31-5-1997. The assessee also preferred another refund

claim on 15-4-1999 for refund of duty paid for the period from 30-10-1995 to 31-5-1997 based on the order of the Commissioner of Central

Excise (Appeals) dated 30-7-1998. The said refund claim was rejected by the lower authority on 29-9-2000 on the ground of limitation that the

duty was not paid under protest. The Assessing Officer rejected the refund claim made by the assessee, holding that the same was not filed within

6 months from the date of payment of duty as per Section 11B of Central Excise Act. Following the decision of the Hon"ble Supreme Court in the

case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , the Assessing Officer held that refund claim made on 15-4-

1999 for refund of duty was not within 6 months from the date of payment of duty. As such, refund claim was barred by limitation. Aggrieved by

the same, the assessee preferred an appeal before the Commissioner of Central Excise (Appeals).

3. The Appellate Authority, on detailed analysis of facts involved and the circumstances under which the duty was paid for the subsequent period

and refund claim was made on 15-4-1999, accepted the claim of the assessee that in view of the observation of the CEGAT in the decision

reported in 1986 (6) ECR 539 , duty paid during the pendency of appeal proceedings should be treated as ""paid under protest"" and the refund

claim made for the subsequent period should be treated as in continuation of the earlier claim and hence the time-limit as per Section 11B was not

attracted. The First Appellate Authority allowed the appeal by directing the lower authority to grant refund of duty, after verifying all other aspects.

Aggrieved by this, the Revenue went on appeal before the Customs, Excise and Service Tax Appellate Tribunal. Applying the decision of the

Apex Court reported in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , the Tribunal rejected the Revenue's appeal.

Hence, the present appeal before this Court by the Revenue.

4. Thus, the determination of substantial question of law involved herein depends upon the question of limitation to make any refund claim, which

in turn 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.

5. Both the Revenue and assessee relied on the same decision of the Apex Court in the case of Mafatlal Industries Ltd. and Others Vs. Union of

India (UOI) and Others, in respect of their respective contentions whether the refund claim was made under protest or not.

6. 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.

7. In other case reported in Dena Snuff (P) Ltd. Vs. Commissioner of Central Excise, Chandigarh, relied on by the Revenue, the Supreme Court

has in para 5 dealt with the issue relating to actual dispute involved herein, but the same relates to cause of action. In that case, the Hon"ble

Supreme Court was called upon to decide starting date of period of limitation, whether it is from the date on which identical third party's case or

the assessee's own case was finally decided by the Tribunal. In the case cited above, the payment was made under protest and the assessee

originally classified the products under sub-heading 2404.60. Whereas, the Revenue classified the products under sub-heading 2404.50. The

CESTAT in the case of another assessee held the same product to be classifiable under the Heading 2404.60 and the same was accepted by the

Tribunal in favour of the assessee. On the basis of such decision, the appellant filed the application for refund of the duty paid under protest. In the

meanwhile, the assessee's own case involving same issue came to be decided on 28-8-2003 in favour of the assessee on the basis of the identical

finding that the assessee's product would be classifiable under sub-heading 2404.60 and not under 2404.50. When the question to be determined

whether the cause of action for refund claim arises after disposal of the assessee's own case or after disposal of the third party-assessee's case,

the Hon"ble Supreme Court in para 5 held mat the relevant date from which the period of limitation starts to run is from the date on which the

assessee's own case finally decided by the Tribunal Le. on 28-8-2003. Nevertheless, it is held that the payment of duty was made under protest

was within time and no limitation was applicable to the refund claim of such duty and refund was hence ordered and the same was also upheld by

the Supreme Court.

8. 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. In the light of the above discussion, we find no justification to interfere with the order of the Customs, Excise and Service Tax Appellate Tribunal. The Civil Miscellaneous Appeal is hence dismissed. Consequently, connected Miscellaneous Petition is closed.

No costs.