
(2003) 09 SC CK 0058

In the Supreme Court Of India

Case No : C. A. No. 1066 of 2001 with No. 1458 of 2003

Dena Snuff (P) Ltd.

APPELLANT

Vs

Commissioner of Central Excise, Chandigarh

RESPONDENT

Date of Decision : 02-09-2003

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 12B

Citation : (2003) 90 ECC 279 : (2003) ECR 15 : (2003) 157 ELT 500 : (2004) 13 SCC 113

Hon'ble Judges : Ruma Pal, J; Ashok Bhan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. The appellant classified its product under sub-heading 2404.60 of the Central Excise Act and paid duty on that basis till 27-7-90 when, according to the appellant, the Inspector Central Excise verbally declined to clear the appellant's product unless the duty at a higher rate under tariff heading sub-heading 2404.50 was paid. There is some dispute as to the date on which such a verbal direction was given by the Inspector but it is not in dispute that the appellant has been paying the duty on the basis that the products were classifiable under Tariff Heading 2404.50 from 25th August, 1990. The payments were made under protest.

2. The classification list was approved on the basis that the appellant's products were classifiable under sub-heading 2404.50 in 1994, In the same year, on 18-2-94 the Central Excise and Gold (Control) Appellate Tribunal (CEGAT) decided in a similar case 1995 (57) ECR 1 68 . (Lachman Das Bihari Lal) that the products were classifiable under sub-heading 2404.60. On the basis of this decision of the Tribunal, the appellant filed an application for refund of the duty which had been paid by it under protest on the basis of the classification of its product under sub-heading 2404.50.

3. As far as the departmental authorities are concerned, they took the view that

the appellant had been unable to establish that the higher rate of duty had not been passed on to its customers and therefore was not entitled to refund. The appellant's appeal to the Tribunal was disposed of by the order which is now impugned before us. The Tribunal did not go into the facts of the case but rejected the appellant's appeal on the preliminary ground, that the application for refund was not maintainable. The reasoning given by the Tribunal was that this Court in the decision *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, had held that the assessee could not rely upon the decision in another assessee's case for the purposes of applying for refund. It would have to obtain a final order in its own proceedings. It was, therefore, held that since the issue regarding the final approval of the classification list was open in that the further appeals from the decision of the departmental authorities were pending, the application for refund could not be entertained. Ultimately, this Court has on 28th August, 1990, in the assessee's own case decided that the assessee was right all along and that the duty was in fact leviable on the basis that the appellant's products were classifiable under tariff subheading 2404.60 and not 2404.50 which had been paid by it under protest.

4. The appellant has raised two issues primarily before us. The first is that the Tribunal had misconstrued paragraph 108(iv) of the decision of this Court in *Mafatlal Industries (supra)* and that paragraph did not in any way preclude an application for refund being made in respect of duties paid under pro test. The second submission is that in any event this Court in *Sinkhai Synthetics & Chemicals (P) Ltd. v. Collector of Central Excise, Aurangabad* reported in 11A and 11B did not apply to duty paid under protest.

5. As far as the first submission is concerned, we are of the 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 subsection (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.

6. However, as far as the second submission is concerned, the submission does not appear to have been raised before the Tribunal at all by the appellant/ assessee. Indeed the Tribunal did not address itself to the question of unjust enrichment having rejected the appeal of the appellant on a point of demurrer namely, the maintainability of the application for refund. Now that the dispute regarding the classification list has ultimately been resolved, it would be open to the appellant to raise the issue of unjust enrichment before the Tribunal. Under

normal circumstances we would have directed the initiation of the proceedings afresh by the appellant, however, having regard to the facts of the case, we do not do so. It is open to the Tribunal to decide the issue on remand as to whether the Departmental authorities were right in holding that the appellant was not in fact entitled to claim for refund and whether the decision in Sinkhai Synthetics and Chemicals Pvt. Ltd. Vs. Collector of Central Excise, would be applicable to the appellant's case.

7. The appeal is accordingly allowed without any order as to costs.

Civil Appeal No. 1458 of 2003 :

8. The issue raised in this appeal is as to whether the appellant was entitled to refund. The appellant's application for refund has been rejected by the Departmental authorities on the ground that no evidence had been adduced by the appellant that the burden of the higher rate of duty on the appellants' products for the material period has been passed on to their customers. The Tribunal has recorded that this finding of fact had not been challenged in the appellants' appeal nor has any evidence had been adduced before it by the appellant to discharge the burden of proof u/s 11B read with Section 12B of the Central Excise Act. The learned Counsel has sought to contend before us that the issue was raised both in the memorandum of appeal and that evidence had in fact been produced before the Tribunal. We are not prepared to entertain the appellant's arguments in view of the categoric recording by the Tribunal. We, therefore, dismiss the appeal on this ground alone. It will be open to the appellant, however, to urge before the Tribunal that the recording that the appellant had not questioned the finding of fact by the appellant authorities and that evidence had been produced that the incidence of the higher levy had not been passed on to the customers was incorrect.

There shall be no order as to costs.