

(2007) 08 DEL CK 0045

In the Delhi High Court

Case No : Cus. A.C. No. 7 of 2007 and CM Application No 5381 of 2007

Hind Agro Industries Limited

APPELLANT

Vs

Commissioner of Customs and Others

RESPONDENT

Date of Decision : 30-08-2007

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B
Constitution of India, 1950 — Article 226, 265
Contract Act, 1872 — Section 72
Customs Act, 1962 — Section 128(3), 2(15), 23, 25(2), 26
Limitation Act, 1963 — Article 113

Citation : (2007) 98 DRJ 1 : (2008) 221 ELT 336

Hon'ble Judges : Madan B. Lokur, J;Dr. S. Muralidhar, J

Bench : Division Bench

Advocate : Kuljeet Rawal, for the Appellant; Mukesh Anand, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—By the common impugned order dated 22nd May, 2006 the Customs, Excise & Service Tax Appellate Tribunal ("CESTAT") dismissed the Customs Appeal Nos. C/853 and 866 of 2004 filed by the Appellants against a common order dated 26th August, 2004 passed by the Commissioner of Customs (Appeals), Delhi-II u/s 128(3) of the Customs Act, 1962 ("Act"). By the impugned order, the CESTAT has, while dismissing appeals, held that the customs authorities were justified in rejecting the claim for refund of the cess on meat products deposited erroneously by both the Appellants during the period 15th January, 2001 to 19th February, 2002. The CESTAT held that although the cess was not payable by the Appellants, the refund applications were rightly rejected since they were filed beyond the statutory time limit prescribed u/s 27 of the Act.

2. The brief facts leading to the filing of these appeals are that both the Appellants are 100% Export Oriented Units ("EOUs") engaged in the manufacture of meat and meat products. A cess was livable on meat products in

terms of Serial No. 2 of the Schedule to the Agricultural and Processed Food Products Export Development Authority Cess Act, 1985 ("Cess Act"). The Ministry of Commerce and Industries, Government of India by a notification dated 17th January, 2001 fixed 0% cess for all 100% EOU. It is stated by the Appellants that even prior to the notification fixing 0% cess, the Appellants had been informed by the Export Promotion Council ("Council") that the matter had taken up by the Council with the Government of India for lifting of the cess in respect of export of meat products produced in the EOUs and that the matter was under the active consideration of the Government. The Appellants were accordingly advised to pay the cess under protest. The Appellants submitted a letter dated 3rd January, 2001 to the Commissioner of Customs, ICD, Tughlakabad, New Delhi stating that they were paying cess under protest. It is claimed that the said letter was directly delivered to Refund Section in the office of the Commissioner of Customs on 4th January, 2001. Although the 0% cess notification was issued on 17th January, 2001, the Appellants learnt of the withdrawal of cess only some time in February 2002. Thereafter they obtained a copy of the said notification, and on 17th May, 2002 filed a refund claim u/s 27 of the Act in the prescribed proforma claiming refund of the cess paid during the period 15th January, 2001 to 19th February, 2002. The Appellant, Hind Agro Industries Limited claimed a refund of Rs.1,42,28,645/- and the other Appellant, Hind Industries Limited, claimed a refund of Rs.10,86,475/-.

3. The Appellants were issued a show cause notice dated 7th August, 2002 by the Deputy Commissioner of Customs (Refund) in which it was stated that the protest under which the payment of cess was made by the Appellants was to no avail since it was a demand for abolition of the cess and did not question the leviability of the cess. It was further stated that the claim for refund had been filed beyond the limitation stipulated u/s 27 of the Act. The Appellants replied to the show cause notice on 23rd August, 2002 pointing out that the payment of cess by them had to be treated as a deposit and that Section 27 was not applicable. A further letter was sent to the Appellants by the Department on 27th December, 2002, inter alia, asking them to show cause why the claim should not be treated as a claim u/s 26 of the Act and why it should not be credited to the Consumer Welfare Fund. This was followed by an oral hearing resulting in an order dated 1st April, 2003 issued by the Assistant Commissioner (Refund) rejecting the refund claim on the ground that it was for a period beyond six months prior to 17th May, 2002, i.e. prior to 17th November, 2001 and Therefore beyond the time limit stipulated u/s 27. It was held that the claim was hit by the doctrine of unjust enrichment inasmuch as the Appellants had failed to show that the burden of the cess had not been passed on to the buyers. As regards the claim made by Hind Agro Industries Limited, a refund of the claim only to the extent of Rs.33,67,964 was admitted but even the said sum was directed to be credited to the Consumer Welfare Fund. As regards the Hind Industries Limited, the claim for refund was limited to a sum of Rs.4,97,937 and this sum was also directed to be credited to the Consumer Welfare Fund. The Assistant

Commissioner held that no reliance could be placed on the letter dated 17th January, 2001 and that in any event the protest was deemed to be finalized on 17th January, 2001, the date on which the notification was issued. On that basis it was held that the refund application should have been filed within six months thereafter in terms of Section 27(1) of the Act.

4. The appeals filed by the Appellants against the aforementioned orders were dismissed by the Commissioner of Customs (Appeal) by the common order dated 26th August, 2004. The Commissioner (Appeals) held that all claims for refund ought to be filed only in terms of Section 27 of the Act read with Rule 11 and "under no other provision and in no other Forum." Further the Commissioner (Appeals) held that the Assistant Commissioner erred in crediting the amount of refund to the extent allowed, to the Consumer Welfare Fund. The authorities were directed to refund to the Appellants the amount found admissible by the Assistant Commissioner applying the limitation u/s 27 of the Act.

5. The CESTAT, while dismissing the appeals of the Appellants, as explained hereinabove, allowed the plea of the Appellants for being paid interest in accordance with law on the admissible amount of refund for the period beginning with the expiry of three months from the date of filing of the refund application till the payment of the refund. However, the CESTAT rejected the Appellants' plea that Section 27 of the Act would not apply to the refund sought of the cess which had been erroneously paid.

6. The principal issue raised in these appeals by the Appellants concerns the applicability of Section 27 of the Act to the claims of the Appellants for refund of the cess. The alternative submission is that even if Section 27 were to apply, the protest letter given by the Appellants would obviate the applicability of the period of limitation in terms of the proviso to Section 27(1) of the Act.

7. After hearing the submissions of learned Counsel for the parties, we admit the appeals and frame for our consideration the following substantial questions of law:

(a) Were the Respondents justified in rejecting the claims for refund of the cess paid by the Appellants, admittedly under a mistake, for the period January 17th 2001 to May 17th 2002, on the ground that these claims were beyond the period stipulated u/s 27 of the Customs Act, 1962?

(b) Even if Section 27 of the Customs Act, 1962 applied the refund claims made by the Appellants, were they not entitled to the benefit of the proviso thereto in view of their letter dated 3rd January, 2001 to the Respondents?

8. As regards the first question, it is not in dispute that no cess was payable on meat products after 17th January, 2001. Consequently, it is not in dispute that the cess was erroneously paid to the customs authorities by the Appellants for the period between 17th January, 2001 and 19th February, 2002. The amount of cess paid erroneously is also not in dispute.

9. The relevant portion of Section 27 of the Customs Act, 1962 which is sought to be invoked by the Respondents reads as under:

27. Claim for refund of duty:

(1) Any person claiming refund of any duty

(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him,

may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months,

from the date of payment of duty and interest, if any, paid on such duty, in such form and manner as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 28C) as the applicant may furnish to establish that the amount of duty and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section and same shall be dealt with in accordance with the provisions of Sub-section (2):

Provided further that the limitation of one year or six months, as the case may be, shall not apply where any duty and interest, if any, paid on such duty has been paid under protest:

Provided also that in the case of goods which are exempt from payment of duty by a special order issued under Sub-section (2) of Section 25, the limitation of one year or six months, as the case may be, shall be computed from the date of issue of such order.

10. There can be no doubt that the above provision applies to a claim for refund of "any duty" within the meaning of that Act. A word "duty" has been defined u/s 2(15) of the Act mean "a duty of customs livable under this Act." The entire Section 27 of the Act can, Therefore, obviously apply if and only if, the refund that is being sought is of customs duty otherwise livable under the Act.

11. The CESTAT has, in the impugned order, failed to account for this legal position and has erred in holding that all applications for refund of any payment mistakenly made to the customs authorities have to be made and processed u/s 27 of the Customs Act. This is also based on an erroneous understanding of the judgment of the Hon"ble Supreme Court in Assistant Collector of Customs and Others Vs. Anam Electrical Manufacturing Co. and Others, which is a format order disposing of the appeals forming part of the batch of matters in which the judgment of the Constitution Bench in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, was rendered. The relevant passage in the majority judgment of B.P. Jeevan Reddy, J., in Mafatlal Industries reads as under (ELT, p. 328):

(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception : where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it.

Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying Clause (c) of Sub-section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

12. The relevant passages of the judgment in Anam Electrical Manufacturing Co. reads as under (ELT, p.262-63):

FORMAT ORDER

Pursuant to the directions given in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , the appeals/Special Leave Petitions coming up for disposal shall be disposed of in terms of one or the other of the clauses below:

(1) xxx xxx xxx xxx xxx

(2) xxx xxx xxx xxx xxx

(3) xxx xxx xxx xxx xxx

(4) The above rules, however, do not apply in the case of a claim for refund of duty levied and recovered under an unconstitutional provision. In such a case, the period of limitation shall be prescribed in Mafatlal Industries. The duty to allege and prove that the duty has not been passed on to another person, of course, remains even in such a case.

13. It is clear that in Mafatlal Industries the Hon''ble Supreme Court had only talked of refund of duty payable within the meaning of either the Central Excises and Salt Act 1944 ("Excise Act") or the Customs Act, 1962, as the case may be. In other words when the Hon''ble Supreme Court said that all claims for refund ought to be filed only in accordance with the Customs Act or Excise Act, it obviously did not include payment made under some enactment, which for some reason, had erroneously been made to the customs authorities. Nowhere did Mafatlal Industries talk of a situation where the refund of a cess paid under the Cess Act, 1985 albeit erroneously, was required to be made under the Excise Act or the Customs Act and under no other enactment. Consequently, the observation in para 4 of the judgment of the Hon''ble Supreme Court in Anam Electrical Manufacturing Co. has also to be understood in the same manner. Para 4 of the said judgment it has been explained that the rules pertaining to refund would not apply where refund is sought of a "duty levied and recovered under an unconstitutional provision." It was explained that the period of limitation in such cases would be in terms of the law laid down in Mafatlal Industries. It is obvious that when the Hon''ble Supreme Court talked of "duty levied and recovered under an unconstitutional provision" the reference was not to a duty of customs or excise. Therefore, to rely upon either Mafatlal Industries or Anam Electrical Manufacturing Co. to deny the claim of the Appellants in this case is entirely misconceived.

14. The judgment of the Hon''ble Supreme Court in Salonah Tea Company Limited v. Superintendent of Taxes, Nowgong : 1988(33)ELT249(SC) is more apposite, in the facts of the present case. In the said case, the demand raised against the Appellants under the provision of Assam Taxation (On Goods Carried by Road and Inland Waterways) Act, 1954 was struck down by the High Court but the consequential relief of refund of tax collected illegally was not allowed on the ground that it was beyond the period of limitation prescribed under that Act. While allowing the appeal, the Hon''ble Supreme Court held that the provision under the said Act for refund would apply "only in a case where money is paid under the Act." It was observed in para 13 as under (ELT, p.254):

Under Article 113 of the Limitation Act, 1963 the limitation was the period of three years from the date the right to sue accrues. It may be noted that in the instant case u/s 23 of the Act, it was provided that the Commissioner shall, in the prescribed manner refund to a producer or a dealer any sum paid or realised in excess of the sum due from him under this Act either by cash or, at the option of the producer or dealer, be set off against the sum due from him in respect of any other period. Section 23 applies only in a case where money is paid under

the Act. If there is no provision for realisation of the money under the Act, the act of payment was ultra vires, the money had not been paid under the Act. In that view of the matter Section 23 would not apply.

15. In U.P. Pollution Control Board and Others Vs. Kanoria Industrial Ltd. and Another, , while negating an objection to the maintainability of writ petition seeking refund of the cess collected without the authority of law, the Court explained and distinguished the dictum in Mafatlal Industries thus:

15. The learned Counsel for the petitioner strongly relied on a Constitutional Bench judgment of this Court in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, . That was a case where refund was claimed on the ground that tax/duty had been collected by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 and the Rules and Regulations or the notifications issued under such enactments. In such cases claims for refund had to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified and within the period of limitation prescribed therein. Hence it was held that petition under Article 226 of the Constitution could not be entertained having regard to the legislative intention evidenced by the provisions of the said Act and the writ petition, if any, would be considered and disposed of in the light of and in accordance with the provisions of Section 11B of the Central Excises and Salt Act, 1944 stating that power under Article 226 has to be exercised to effectuate the rule of law and not to abrogate it. In the present cases there is no corresponding section to Section 11B of the Central Excises and Salt Act, 1944 for making claim for refund of money and, Therefore, the respondents could maintain the writ petitions under Article 226 of the Constitution. Further in para 108 (ii) of the judgment it is held that where, however, a refund is claimed on the ground that the provisions of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of suit or by way of writ petition.

16. There can be no manner of doubt that the custom authorities in the instant case were bound to refund the cess erroneously paid by the Appellants for the period from 15th January, 2001 till 19th February, 2002 under a mistake of law. They had paid the cess when in fact no such cess was payable. There is no question of processing a claim of refund of such amount in terms of the Customs Act at all because the payment made mistakenly was not under that Act. In the circumstances, the period of limitation u/s 27 of the Act would not apply, as explained in Salonah Tea Company Limited. The applications for refund having been made well within the period of three years" after discovery of mistake by the Appellants, are not barred by limitation. Question (a) in para 7 above is accordingly answered in favor of the Appellants. Consequently, the need to answer question (b) does not arise.

17. In that view of the matter, the impugned order dated 22nd May, 2006 passed

by the CESTAT, the order dated 26th August, 2004 passed by the Commissioner (Appeals) and order dated 1st April, 2003 passed by the Assistant Commissioner (Refund) are hereby set aside. A direction is issued to the Respondents to refund each of the Appellants the balance amount of the refund as claimed by them along with interest 6% per annum from the date of payment till the actual date of refund. If the refund is not made within a period of four weeks from today and in any event not later than 27th September, 2007, then simple interest at 12% per annum would be payable for the delayed period.

18. These appeals are allowed with costs of Rs.5,000/- to each of the Appellants which will be paid by the Respondents to each of them within a period of four weeks from today and in any event not later than 27th September, 2007. The pending application stands disposed of.