

(2005) 11 MAD CK 0017

In the Madras High Court

Case No : Writ Appeal No's. 2114 and 2219 of 2002 and Writ Petition No's. 33727 to 33731, 36531 to 36540, 37585 to 37593, 37853 to 37860 and 38316 to 38322 of 2002

K. Thangavel proprietor Murugan Arul Lorry Body Labour Works

APPELLANT

Vs

The Assistant Commissioner of Central Excise, The Deputy Commissioner of Central Excise, Salem Division, The Commissioner of Customs and Central Excise (Appeals) and Customs, Excise and Gold Control Appellate Tribunal

RESPONDENT

Date of Decision : 30-11-2005

Acts Referred:

Central Excise Rules, 1944 — Rule 2(14), 233B, 233B(8)
Central Excises and Salt Act, 1944 — Section 11B, 11B(1), 3
Constitution of India, 1950 — Article 141

Citation : (2005) 11 MAD CK 0017

Hon'ble Judges : S.K. Krishnan, J;P. Sathasivam, J

Bench : Division Bench

Advocate : R. Thiyagarajan for M. Muthappan, in W.A. No. 2114 of 2002 and C. Natarajan for N. Inbarajan, in W.A. No. 2219 of 2002, for the Appellant; V.T. Gopalan, A.S.G. assisted by S. Manikumar, Sr. Central Govt. Standing Counsel and S.N. Kribananadan, for the Respondent

Final Decision : Dismissed

Judgement

P. Sathasivam, J.—Since the issue raised in all these matters is one and the same, they are being disposed of by the following common order.

2. Aggrieved by the order of the Customs, Excise and Gold Control Appellate Tribunal (in short CEGAT), Chennai 6, remitting the matter back to

the Original Authority for de novo consideration, the appellants and the petitioners i.e., Lorry Body Works, filed the above writ appeals and writ

petitions.

3. Writ Appeal No. 2114 of 2002, is directed against the order of the learned single Judge dated 01.07.2002 made in Writ Petition No. 2 3393 of

2002, in and by which, following his earlier order dated 19.06.2002 made in Writ Petition No. 21298 of 2002, the learned Judge, after finding

that the observation made in para 6 of the order impugned in that writ petition is unnecessary, dismissed the writ petition and confirmed the order

of remand as ordered by the CEGAT, Chennai 6.

4. Writ Appeal No. 2219 of 2002, is filed against the order of the very same learned Judge dated 19.06.2002 made in Writ Petition No. 21298 of

2002, in and by which, the learned Judge confirmed the order of the CEGAT and remitted the matter back to the Original Authority for de novo

consideration with an observation that the Original Authority has to pass fresh orders as per Rule 233B of the Central Excise Rules, 1944 (in short

the Rules"), de hors to para 6 of the CEGAT's order and dismissed the writ petition.

5. The brief facts of the case of the appellant/petitioner in Writ Appeal No. 2114 of 2002.

(a) Lorry Body Labour Works comes under the Small Scale Sector Industry of Lorry Body Building. Lorry Body Building is done on the duty

paid Motor Vehicle Chassis supplied by the customers. Body building falls under Central Excise Tariff Heading 87.07. It is a specified item under

the Small Scale Industries Exemption Notification No. 175/86, Central Excise, dated 01.03.1986. When the new Tariff Act of Central Excise

1985 was introduced, Lorry Body Building came under Tariff 87.04 and it became dutiable. However, persons doing job works at Namakkal

coming under Small Scale Industries are exempted from payment of excise duty upto Rs. 7.50 lakhs of first clearance in 1986 and for subsequent

financial years Rs. 15 lakhs upto 1989-90 and thereafter upto Rs. 20 lakhs for 1990-1991.

(b) The lorry body building work become dutiable from March, 1986. Central Excise Authorities insisted upon taking out a licence under Tariff

Heading 87.04 and made them to pay duty first at 20% advalorem as per Notification 162/86 Central Excise dated 01.03.1986.

(c) The Association of Lorry Body Builders at Namakkal made a representation to

the Central Government and thereafter, the duty was brought down to Rs. 4,000/- per Motor Vehicle as per Notification No. 278/86 dated 24.04.1986, and since they are only job workers, claimed exemption from payment of duty under the SSI Exemption Notification. The body building work is taken up by them on the duty paid Motor Vehicle chassis. The petitioners are not the manufacturers of the Motor Vehicles. However, they were compelled to pay the duty of Rs. 4,000/- per vehicle. The petitioners gave a protest letter stating that there is no liability to pay duty. When the Department insisted upon the payment of Rs. 4,000/- by the petitioners towards excise duty, they paid it under protest. The classification under tariff heading 87.04 was confirmed by the Assistant Collector of Central Excise after issue of the necessary show cause notice. The petitioner took the matter in Appeal to the Collector (Appeals) Tiruchirappalli, who by order dated 26.03.1993, in Appeal Nos. 67 to 104 of 1993, agreed with the petitioners and accepted the classification under Tariff Heading 87.07 along with the benefit of the Exemption Notification No. 176/86. The Appellate Authority passed the said order following the decision of the High Court of Punjab and Haryana reported in Union of India (UOI) and Others Vs. Darshan Singh Pavitar Singh Body Makers and Others, .

(d) In the meantime, the Department, had filed a SLP before the Supreme Court against the judgment of the Punjab and Haryana High Court.

Hence, the Collector (Appeals) though agreed that the classification will be under 87.07, ordered the clearance of the vehicles on furnishing bank guarantee of Rs. 4000/- per vehicle till the matter was over before the Supreme Court. The Supreme Court, accepted the judgment of the Punjab & Haryana High Court by its judgment dated 02.09.1997, in the case reported in Collector of Central Excise Vs. Ram Body Builders, . Following the said decision of the Supreme Court, the CEGAT, dismissed the appeals on 14.06.1999, filed by the Revenue and allowed the appeals filed by the petitioners, holding that there is no liability to pay Rs. 4,000/- per vehicle either in cash or by way of bank guarantee. Those who have paid the duty in cash at the rate of Rs. 4,000/- per vehicle had filed applications claiming refund of the same, since the payments made in cash were made under protest as well as the decision of the Supreme Court was rendered on

02.09.1997 and the CEGAT's final decision was made on

14.06.1999, the question of limitation or time bar does not arise at all.

(e) On receipt of the claim for refund, the Department issued show cause notice to the claimants, calling upon them to show cause why the refund

applications should not be dismissed on the ground that they had not followed the procedure set out under Rule 233-B of the Central Excise Rules,

why the claims were not made within six months from the relevant date and why they had not produced any documents to show that the duty was

not passed on to their customers or any other persons? The Deputy Commissioner of Central Excise, Salem Division, Salem, by order dated

09.02.2001, rejected the refund claim on the ground that the claims are barred by limitation and on the application of the doctrine of unjust

enrichment.

(f) Aggrieved by the order of Deputy Commissioner, dated 09.02.2001, the petitioner filed an appeal before the Commissioner of Central Excise

(Appeals) Trichy. The appellate Authority found that the payments were made under protest, it does not amount to payment of duty as the

classification was in dispute, the petitioner has not passed on the excise duty to the customers, accordingly, by order dated 20.07.2001, allowed

the appeal with a direction to sanction the refund. Since the refunds were not made, the petitioner and others approached this Court by way of writ

petition and at the admission stage, the Department informed this Court that the 4th respondent/CEGAT, by order dated 26.03.2002 had

disposed of the appeals filed against the order of the Commissioner (Appeals). By the said order, the CEGAT set aside the order of the

Commissioner (Appeals) and remanded the matter back to the Original authority for de novo consideration. Aggrieved by the order of the

CEGAT, the petitioner has filed Writ Petition No. 2 3393 of 2002. (g) By order dated 19.06.2002, the learned single Judge confirmed the order

of the CEGAT, dismissed the writ petition with slight modification, viz., deleting observation/direction made by the CEGAT in para 6 of its order in

relation to Rule 233-B of the Central Excise Rules, 1944. Similar order has been passed by the very same learned Judge on the same day in W.P.

No. 21298 of 2002. Questioning those orders, the above writ appeals have been filed.

6. Challenging the similar order passed by the CEGAT, remitting the issue to the Original authority for de novo consideration, aggrieved persons,

i.e., Lorry Body Builders have filed the writ petitions.

7. Heard Mr. R. Thiyagarajan and Mr. C. Natarajan, learned senior counsel for the appellants and writ petitioners as well as Mr. V.T. Gopalan,

learned Additional Solicitor General for the Central Excise Department.

8. After taking us through the relevant materials and the provisions applicable, the learned senior counsel appearing for the appellants/petitioners

would submit that CEGAT is not justified in remitting the matter back to the Original Authority and the learned single Judge also committed an

error in affirming the remittal order of the CEGAT. Mr. C. Natarajan, learned senior counsel would point out that the Tribunal itself ought to have

decided the issue on merits. Mr. R. Thiyagarajan, learned senior counsel would contend that the Tribunal committed an error in remanding the

matter back to the Original Authority without assigning adequate reasons, when the Commissioner (Appeals) considered and decided in favour of

the Lorry Body Builders.

9. On the other hand, Mr. V.T. Gopalan, learned Additional Solicitor General, appearing for the Central Excise Department contended that the

CEGAT is justified in remitting the matter back to the Original Authority, since relevant matters of fact have to be considered. However, according

to him, the observation of the learned Judge directing the Original Authority to decide the issue without reference to the observation/conclusion

made in para 6 of the order of the CEGAT is not correct.

10. We have perused the relevant materials and considered the rival contentions.

11. For convenience, we shall refer the parties as arrayed before the learned single Judge.

12. It is not in dispute that all the petitioners in these cases are ""Lorry Body Builders"" and they are converting chasis into ""goods transport

vehicles"". The dispute was with regard to the activity undertaken by them and the question was, whether the building of body on the chasis of

transport vehicles would be covered by the levy u/s 3 of Central Excise Act, 1944 (in short ""the Act""). It is their case that they were discharging

duty as per the relevant provisions of the Notification and protest were lodged by them with Proper Officer. It is also not in dispute that the

Hon"ble Supreme Court in the case of CCE v. Ram Body Builders reported in 1997 (94) ELT 422 held that bus/truck bodies built chassis supplied

by the customer is classifiable under Heading 87.07 of the Central Excise Tariff and benefit of SSI exemption Notification No. 175/86 is available.

Pursuant to the said decision of the Supreme Court, the petitioners have filed refund applications with the Proper Officer. The Original Authority,

viz., Deputy Commissioner, after finding that the applications are time barred, the benefit of the decision of the Supreme Court referred to above is

not applicable and on the ground of unjust enrichment, rejected all the applications. Questioning the said order, the petitioners filed appeal before

the Commissioner of Customs and Central Excise (Appeals). The Commissioner (Appeals), found that payments were made under protest and

they did not pass on the excise duty burden to their customers, accepted the claim for refund, allowed their appeals and directed to sanction the

refund. Questioning the identical orders of the Commissioner (Appeals), the Revenue filed further appeal before the CEGAT.

13. Before the CEGAT, the Revenue put forward that in some cases there was a clear cut finding about passing on incidence of duty, and the

refund based on Ram Body Builders could not be granted as it has to be established whether any one or all of them were parties before the

Supreme Court, in view of the decision of the Apex Court in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others,

. In the absence of those relevant materials, the petitioners are not entitled to refund prayed for and remitted all the matters back to the Original

Authority.

14. The observation and conclusion of the CEGAT in para 6 of its order is to be considered. Before going into the same, it is relevant to refer the

statutory provisions applicable to the cases on hand.

Section 11B of the Act, speaks about claim for refund of duty. As per sub-Section (1), a person claiming refund of any duty of excise has to

make an application for refund to the Assistant Commissioner or Deputy Commissioner of Central Excise before the expiry of six months from the

relevant date and in such manner as prescribed, and the application shall be accompanied by necessary documents or other evidence to establish

that the amount of duty of excise in relation to which refund is claimed was

collected from, or paid by him and the incidence of such duty had not been passed on by him to any other person.

Second proviso to sub-section (1) of Section 11B makes it clear that the limitation of six months shall not apply where any duty has been paid under protest.

Sub-section (2) speaks about procedure to be followed by Assistant Commissioner/Deputy Commissioner on the application made for refund.

Rule 2(14) of the Rules defines ""Proper Officer"".

Rule 233B refers procedure to be followed in cases where duty is paid under protest. Sub-rule (8) of Rule 233-B makes it clear that if any of the provisions of this Rule has not been observed, it shall be deemed that the assessee has paid the duty without protest.

15. We have already referred that the applications for refund have been made after the judgment of the Supreme Court in Ram Body Builders case

was pronounced. It is also the claim of the petitioners that without knowing the correct legal position, the duty was paid under protest, and the

applications for refund were made to the "" Proper Officer"" supported by documents and they also filed affidavit to the effect that the duty paid had

not been passed on to the customers. Though the Commissioner (Appeals) has accepted the claim of the petitioners, as rightly pointed out by the

Additional Solicitor General, the required factual details as mentioned above have not been placed by the petitioners. On verifying the order of the

Commissioner (Appeals), we are in agreement with the contention of the learned Additional Solicitor General. In the impugned order, the CEGAT,

after referring the decision in Mafatlal Industries case (cited supra), observed that the benefit of the decision in Ram Body Builders will not be

applicable to the petitioners, since they are not parties in the said Appeals before the Supreme Court. It is also the conclusion of the CEGAT that

whether the assessment was provisional and the levy and payment of duty have reached finality are matters of fact which are to be determined in

each case before applying the embargo of para 99(iv) in the case of Mafatlal Industries. On these grounds, the CEGAT, after setting aside the

orders of Commissioner (Appeals), remanded the matter to the Original Authority for de novo consideration. In Mafatlal Industries case at 86,

their Lordships have held as under,

86. 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 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.

16. After discussing the issue, their Lordships have propounded certain propositions in para 99. The Revenue very much relied on Clause (iv) in

para 99. In this, the Supreme Court has held that it is not open to any person to make a refund claim on the basis of decision of a Court or

Tribunal rendered in the case of another person. In view of the above decision, the petitioners have to inform whether they were parties in the case

of Ram Body Builders to enable them to claim refund. However, Mr. C. Natarajan, learned senior counsel by drawing our attention to the decision

of the Supreme Court in the case of U.P. Pollution Control Board and Others Vs. Kanoria Industrial Ltd. and Another, , would contend that when

the Supreme Court declared a law and held that a particular levy is valid or not valid, it cannot be contended that the said decision would bind only

those parties who were before the Court and not others in respect of whom appeal had not been filed. The following conclusion of their Lordships

is pressed into service.

When the Supreme Court declares a law and holds either a particular levy as valid or invalid it is ideal to contend that the law laid down by the

Supreme Court in that judgment would bind only those parties who are before the Court and not others in respect of whom appeal had not been

filed. To do so is to ignore the binding nature of a judgment of the Supreme Court under Article 141 of the Constitution. To contend that the

conclusion reached in such a case as to the validity of a levy would apply only to the parties before the Court is to destroy the efficacy and integrity

of the judgment and to make and mandate of Article 141 illusory. When the main judgment of the High Court has been rendered ineffective, the

judgment of the Supreme Court would be applicable even in other cases.

The learned senior counsel contended that after the judgment of the Supreme Court in Ram Body Builders, the petitioners, whether parties to the

said decision or not, are entitled to avail the benefit of the decision, provided, if they, satisfy other conditions as referred to above in the earlier

parts of our order.

17. In the case of Commissioner of Central Excise Vs. ITC Ltd., , a Division Bench of this Court held that Rule 233B cannot be construed in a

narrow, pedantic or hyper-technical manner. It was further held that Rule 233 B, as interpreted by the decision of the Supreme Court, only means

that substantively there must be a protest in writing. They also held that whether the duty paid under protest or not, is basically a question of fact.

18. In the case of Collector of Customs and Central Excise, Meerut Vs. Citurgia Biochemicals Ltd., , the Supreme Court held that payment of

refund to assessee shall be subject to the condition that burden of duty was not passed on to any other person as per the law declared in Mafatlal

Industries case. The Apex Court further held that the Original Authority shall first determine whether the payment of duty was made and in case it

is found that the payment was made under protest, it will be governed by the decision in Mafatlal Industries case.

19. In the case of India Cements Ltd. Vs. Collector of Central Excise, , after perusing the letter of protest, their Lordships concluded that,

An ordinary reading with common sense will reveal to anybody that the appellant was not accepting the liability without protest. We have no

hesitation to hold that the letter was in the nature of protest. That being the position, the question of limitation does not arise for refund of the duty.

After holding so, their Lordships accepted the stand taken by the India Cements and declared that they are entitled to refund of the amount.

20. We have already referred to the relevant provisions of the Act and the Rules applicable to the claim for refund and the decisions of Supreme

Court in Ram Body Builders case as well as Mafatlal Industries case. As said earlier, the applicants have to furnish the required details, including

the particulars regarding application made, the Officer/authority to whom it was made, whether the assessment was provisional or reached its

finality and whether the payment of duty had not been passed on to the customer. Though the learned senior counsel submitted that all the relevant

details are available, as discussed earlier, the factual materials and documents cannot be placed before the CEGAT and all those details/particulars

have to be verified by the Original Authority in order to arrive at a conclusion that the applicants are entitled to an order of refund. In such

circumstances, we are of the view that the CEGAT is fully justified in remitting the matter back to the Original Authority for de novo consideration.

However, as rightly observed by the learned single Judge, the CEGAT having found that the matter requires de novo consideration at the hands of

the Original Authority, is not justified in arriving at a conclusion that the embargo in para 99 (iv) in Mafatlal Industries case would be applicable and

the decision in Ram Body Builders case will not be applicable to the petitioners. We are of the considered view that the said

observation/conclusion is not warranted when the matter is to be considered afresh by the Original Authority. We are also satisfied that the said

observation in para 6 of the order of the CEGAT is totally uncalled for and if the same is retained, undoubtedly, it would give a wrong signal to the

Original Authority, while considering the issue afresh. While agreeing with the conclusion of the learned single Judge, it is made clear that the

Original Authority is free to decide the applications for refund afresh untrammelled by the above observation made by the CEGAT in para 6. Both

parties are at liberty to place relevant materials and it is for the Original Authority to pass fresh orders in accordance with law, more particularly,

with reference to the decisions of the Supreme Court on the point in issue. Consequently, the writ appeals and the writ petitions are dismissed with

the above observations. No costs.

In view of dismissal of the main cases, connected miscellaneous petitions are also dismissed.