

A ASSISTANT COLLECTOR OF CUSTOMS AND ORS.
v.
ANAM ELECTRICAL MANUFACTURING CO. ETC.

JANUARY 28, 1997

B [S.C. AGRAWAL, B.P. JEEVAN REDDY AND
G.T. NANAVATI, JJ.]

C *Central Excises and Salt Act, 1944/Customs Act, 1962—Surcharge of
10%—Levy of—Refund—To be made in accordance with the decision in
Mafatlal Industries.*

Mafatlal Industries v. Union of India, (1996) 9 SCALE 457, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1805-10
of 1979.

D WITH

Civil Appeal Nos. 18126 of 1979.

E From the Judgment and Order dated 29.11.73 of the Madras High
Court in W.P. No. 25-42/70,137, 3631-34 of 1971.

AND

Civil Appeal Nos. 1503-1519 of 1978.

F From the Judgment and Order dated 13.3.74 of the Madras High
Court in W.P. Nos. 117-32 of 1974.

K.N. Bhat, Additional Solicitor General, G. Prakash and C.V. Subba
Rao for the Appellants.

G D. Ramakrishna Reddy, A.V.V. Nair and S.K. Mehta for the
Respondents.

The following Order of the Court was delivered :

Heard the counsel for the parties.

H So far as the question of levy of surcharge of ten percent which is in

issue herein is concerned, we affirm the judgment and order of the Madras High Court. So far as the question of refund is concerned, it is obvious that it shall be governed by the law declared in *Mafatal Industries v. Union of India*, (1996) 9 SCALE 457, read with clause (6) of the format order, a copy of which is enclosed herewith which is as follows :

"Where a refund application or an appeal is preferred under and in accordance with the directions (1), (2), (3) and (4) above, the same shall be entertained only if the application for refund/appellant files affidavit stating that he has not passed on the burden of the duty, which is claimed by way of refund, to another person. In case the applicant for refund is a company or a society, the affidavit shall be sworn by the Managing Director or the Principal Officer of the Company or the Society, as the case may be. Such an affidavit shall be treated as an averment/assertion which an applicant for refund has to make in terms of the judgment in *Mafatal*.

The appeals are disposed of in the above terms. No costs.

G.N.

Appeals disposed of.

Pursuant to the directions given in *Mafatal Industries v. Union of India*, (1996) 9 SCALE 457, 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) Where a refund application was filed by the manufacturer/purchaser beyond the period prescribed by the Central Excise Act/Customs Act in that behalf, such petition must be held to be untenable in law. Even if in any appeal, suit or writ petition, direction has been given that the refund application shall be considered without reference to the period of limitation prescribed in the Central Excise Act/Customs Act - or that the period of limitation shall be taken as three years - such a direction of the Appellate Court/Civil Court/High Court shall be deemed to be unsustainable in law and such direction shall be set aside. The period prescribed by the Central Excise Act/Customs Act for filing a refund application in the case of "illegal levy" cannot be extended by any authority or court.

(2) Where, however, a refund application was filed within the period prescribed by the Central Excise Act/Customs Act but has been dismissed wholly or partly on any ground and the said order is questioned by way of

A a writ petition or a suit or any appeal arising therefrom the manufacturer/purchaser shall be entitled to withdraw the writ petition, suit or an appeal arising therefrom, as the case may be, and file an appeal before the appropriate appellate authority within sixty days from today. It is clarified herewith that even in a case where such writ petition has been allowed and an appeal filed by the revenue is pending, the writ petitioner shall be entitled to withdraw the writ petition, in which event, the revenue appeal shall be disposed of permitting the writ petitioner to withdraw the writ petition to pursue the remedy proposed hereby. If such an appeal is filed, it shall be entertained without raising an objection on the ground of limitation and shall be dealt with in accordance with law. This direction shall apply even in cases where the High Court or Civil Court is approached after exhausting the remedy of appeal to Collector (Appeals). He can file an appeal to C.E.G.A.T. within sixty days from today, after withdrawing the writ petition or the suit, as the case may be.

(3) Where, however, a writ petition or suit claiming refund was filed directly in the High Court/Civil Court (i.e., without filing a refund application), the petitioner/plaintiff shall be entitled to withdraw such writ petition/suit or any appeal arising therefrom and prefer a refund claim under section 11(B) within sixty days from today *provided* the writ petition or suit was filed within the period prescribed by the Central Excise Act/Customs Act for filing the refund application. It is clarified herewith that even in a case where such writ petition has been allowed and an appeal filed by the Revenue is pending, the writ petitioner shall be entitled to withdraw the writ petition, in which event, the Revenue appeal shall be disposed of permitting the writ petitioner to withdraw the writ petition to pursue the remedy proposed hereby.

(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.

(5) Where a person challenges the constitutionality of a provision in the Central Excise Act/Customs Act in a High Court or the Supreme Court but fails in his challenge to constitutionality, he cannot take advantage of the decision in the case of another person striking down the said provision, as explained in the judgment. This rule is evolved in the particular context

of refund claims under these two enactments and has to be observed. A

(6) Where a refund application or an appeal is preferred under and in accordance with the directions (1), (2), (3) and (4) above, the same shall be entertained only if the applicant for refund/appellant files affidavit stating that he has not passed on the burden of the duty, which is claimed by way of refund, to another person. In case the applicant for refund is a company or a society, the affidavit shall be sworn by the Managing Director or the Principal Officer of the Company or the Society, as the case may be. Such an affidavit shall be treated as an averment/assertion which an applicant for refund has to make in terms of the judgment in *Mafatal*. B

(7)(a) Where the refund claim is rejected by this Court, the assessee who has already obtained any amount by way of refund shall be liable to pay back the same to the department and the department shall be entitled to recover the same in accordance with law. C

(b) If the refund claim is rejected by an authority under the Act and where the assessee has already obtained the refund he shall be liable to pay back the said amount to the department according to law and the department shall be entitled to recover back the said amount, subject to orders, if any, by an Appellate Authority. D

G.N.

Appeal disposed of. E