

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

CIVIL APPEAL NO.4014-4015 OF 2001

M/S. INDIAN REFRIGERATION INDUSTRIES  
Appellant(s)

VERSUS

COMMISSIONER OF CENTRAL EXCISE, DELHI  
Respondent(s)

(WITH OFFICE REPORT)

Date: 06/09/2006 These Appeals were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ASHOK BHAN

HON'BLE MR. JUSTICE MARKANDEY KATJU

For Appellant(s)

Mr. C. Harishankar, Adv.

Mr. P. Mohapatra, Adv. for

Mr. Tara Chandra Sharma, Adv.

For Respondent(s)

Mr. K.Radhakrishnan, Sr. Adv.

Ms. Kiran Bhardwaj, Adv. for

Mr. B.Krishna Prasad, Adv.

UPON hearing counsel the Court made the following

O R D E R

The Appeals are allowed and the demand raised against the appellant for the year 1978-1979 is hereby dropped . Parties shall bear their own costs.

(Parveen Kr. Chawla)  
(Kanwal Singh)

Court Master

Court Master

[Signed Order is placed on the File]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 4014-4015 OF 2001

M/s. Indian Refrigeration Industries

..Appellant

Versus

Commissioner of Central Excise, Delhi

..Respondent

O R D E R

These appeals are directed against the Final Order Nos.276-

277/2001-B dated 25.5.2001 passed by the Customs, Excise & Gold

(Control) Appellate Tribunal, New Delhi (for short 'the Tribunal') in

Appeal Nos. E/106 & 107/94-B.

The only point urged before us is that the Show Cause

Notice dated 4.3.1980 issued by the department was beyond the

period of six months and, therefore, is barred by time.

The period involved in these appeals is financial year 1978-1979 i.e. 1.4.1978 to 31.3.1979.

The facts giving rise to these appeals are:

Appellant manufactures refrigerating and air conditioning machinery, appliances and parts thereof falling under Tariff item 29A of the then Central Excise Tariff. It filed classification list effective from 1.4.1978 in respect of the goods manufactured by it. In this classification list, it claimed exemption under Notification No. 71/78 dated 1.3.1978. It declared that the value of the goods falling under item 29A during the year 1977-78 was Rs.42,03,147.46 (Rs.4,59,185.50 dutiable goods plus Rs. 37,43,961.96 exempted goods). The classification list was approved by the Assistant Collector on 17.12.1979 but the claim of the appellant for exemption under Notification No. 71/78 was rejected.

On 26.12.1979, Superintendent, Central Excise, raised a demand against the appellant demanding duty of Rs.5,91,400/- being the duty due from the appellant as a result of finalization of RT-12 returns.

In the meantime, appellant filed an appeal against the order passed by the Assistant Collector dated 17.12.1979 rejecting its claim for exemption under Notification No. 71/78. The appellate authority set aside the order impugned before it and remanded the

matter to the Assistant Collector for de novo adjudication in accordance with law after affording due opportunity to the appellant.

The Assistant Collector thereafter issued a show cause notice dated 4th March, 1980 to the appellant under Rule 10(1) of the Central Excise Rules, 1944 (for short 'the Rules') which reads as under:

"10 Recovery of duties not levied or not paid, or short levied or not paid in full or erroneously refunded:-

(1) Where any duty has not been levied or paid or has been short levied or erroneously refunded or any duty assessed has not been paid in full, the proper officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid, or which has been short-levied, or to whom the refund has erroneously been made, or which has not been paid in full, requiring him to show cause why he should not pay the amount specified in the notice:

xx xx xx  
xx xx xx"

calling upon it to show cause why exemption from payment of duty on the aggregate value of first not exceeding Rs. 5 lacs clearances during the year 1978-79 under Notification No. 71/78 dated 1.3.1978 be not denied and confirmed as disallowed earlier on 17.12.1979. Extended

period of limitation was not invoked.

Appellant filed its reply to the show cause notice. After taking into consideration the reply to the show cause notice and affording an opportunity of hearing to the appellant, the Assistant Collector vide his order dated 24.4.1980 confirmed the demand for the year 1978-1979.

Aggrieved against the order of the Assistant Collector, the appellant filed an appeal before the Collector of Central Excise (Appeals) which was rejected.

Being further aggrieved, the appellant filed an appeal before the Tribunal which has been dismissed by the impugned order. The appellant did not contest the appeal on merits before the Tribunal. It was conceded by it that the appellant was not entitled to the exemption under Notification No. 71/78 during the year 1978-79.

As regards the contention that the demand raised was barred by time, it has been held that the classification list filed by the appellant w.e.f. 1.4.1978 was approved by the Assistant Collector on 17.12.1979 in which the benefit of exemption under Notification No. 71/78 claimed by the assessee was denied, against which the appellant filed an appeal which was allowed and the matter was remanded back to the Assistant Collector by the Collector (Appeals) for de novo consideration. At this stage notice was issued on 4.3.1980 which was within six months of the approval of the

classification list, i.e. on 17.12.1979. Relying upon a decision of the larger Bench in Rajiv Mardia vs. CCE, Indore 2001 (129) ELT 334 (T-LB), it was held that the assessments from 1.4.1978 till 17.12.1979 the date on which the classification list was approved remained provisional. In the larger Bench, in the aforesaid case, it was held as under:

"From the above discussion, we are clear in our mind that Samrat International Pvt. Ltd. envisages payment of duty on provisional basis pending decision of classification list or price list. For these payments to be treated as provisional, procedure contemplated by Rule 9B is not to be followed. Therefore, we are of the considered view that the observation made by the Larger Bench of Five Members that there should be material on record to show that procedure laid down in Rule 9B was followed for the purpose of showing that the assessments are provisional, cannot hold good in the case of payments of duty effected pending finalization of classification list or price list. Subject to this clarification, we agree with the observations and findings arrived at by the said Bench in Misc. Order No. 47/2000-A."

The larger Bench of the Tribunal had recorded the finding, reproduced above, relying upon a judgment of this Court in Samrat

(SC). It has been held in the said case that the assessments made till the approval of the classification list would be deemed to be provisional and therefore, procedure contemplated by Rule 9-B is not required to be followed.

Counsel for the appellant has pointed out that the observations made by this Court in Samrat International (P) Ltd.

(supra) were explained in Metal Forgings vs. Union of India 2002 (146)

ELT 241(SC) and it was held that the decision in Samrat International

(P) Ltd.(supra) was given on its own peculiar facts and could not be

understood to mean that till the classification list is approved, the

assessment framed would be treated to be provisional without

following the procedure laid down under Rule 9B of the Rules. It

was held:

"From the above, it is clear that to establish that the clearances were made on a provisional basis, there should be first of all an order under Rule 9B of the Rules, and then material to show that the goods were cleared on the basis of said provisional basis, and payment of duty was also made on the basis of said provisional classification. These facts in the instant case are missing, therefore, in our opinion there is no material in the instant case to establish the fact that either there was a provisional classification

or there was an order made under Rule 9B empowering the clearance on the basis of such provisional classification. In the absence of the same, we cannot accept the argument of the Revenue that in fact the order of the Assistant Collector dated 21.1.1976 is a provisional order based on which clearance was made by the appellants or that they paid duty on that basis. On the contrary, as held by the Judicial Member the said order of classification was a final order, therefore, the Revenue cannot contend the limitation prescribed under Section 11A does not apply."

This decision in Metal Forgings's case was approved by a three Judge

Bench of this Court in Commissioner of Central Excise, Calcutta vs.

Hindustan National Glass & Indus. Ltd. 2005 (182) ELT 12(SC) (refer

to the observations made in para 18 of the judgment).

In view of the subsequent judgments of this Court in Metal

Forgings's case and Hindustan National Glass & Indus. Ltd.'s case

(supra), the impugned order based on the decision of Samrat

International (supra) cannot be sustained. The assessment framed

till the approval of the classification list on 17.12.1979 cannot be

treated to be provisional.

Admittedly, in the present case, show cause notice was

issued on 4th March, 1980 i.e. much beyond the period of six months

as provided under clause (1) of Rule 10 of the Rules. Extended period of limitation had not been invoked in the present case.

On behalf of the appellant, another point raised before the Tribunal was relating to reworking out of the assessable value under Section 4(4)(d)(ii) of the Act. The Tribunal did not permit this argument to be raised as the same had not been raised before either of the authorities below. We are not going into this question in view of our finding that the show cause notice issued to the appellant was beyond the period of six months and therefore barred by time.

For the reasons stated above, these appeals are allowed and the demand raised against the appellant for the year 1978-1979 is hereby dropped. Parties shall bear their own costs.

.....J.

[ASHOK BHAN]

NEW DELHI; .....

SEPTEMBER 06, 2006. [MARKANDEY KATJU]