CASE NO.:
Appeal (civil) 2373 of 2000

PETITIONER:
SRF LIMITED

Vs.

RESPONDENT:
ASSISTANT COLLECTOR OF CENTRAL EXCISE, TRICHY

DATE OF JUDGMENT: 07/11/2001

BENCH:
CJI, Y.K. Sabharwal & Brijesh Kumar

JUDGMENT:

Y.K.Sabharwal, J.

The appellant is a manufacturer of industrial fabrics. It is claimed that the said fabrics have to be dipped in a solution of Resorcinol Formaldehyde Latex Solution (RFL solution) in order to achieve a good adhesion of rubber to such fabrics. The appellant manufactures Resorcinol Formaldehyde solution (RF solution) by mixing Resorcinol and Formaldehyde in the presence of Sodium Hydroxide and water and consumes the same in the manufacture of RFL solution, otherwise known as 'dipped solution'. The appellant paid excise duty on RF solution which is stated to have been captively consumed in the manufacture of dipped solution used for the manufacture of dipped fabrics.

The claim of the appellant that RF solutions are not 'goods' under Section 3 of the Central Excise and Salt Act, 1944 (for short 'the Act') and, therefore, not subject to any central excise duty was initially rejected by the concerned Assistant Collector of Central Excise. The result was that pending the appeal proceedings the appellant paid the excise duty under protest. This controversy was, however, finally decided by the Tribunal by order dated September 25, 1990 whereby the Tribunal held that no duty was leviable on RF solutions.

As a result of the order of the Tribunal, the appellant filed a refund claim dated March 14, 1991 under Section 11-B of the Act seeking refund of Rs.5,41,498.67 being the amount of duty paid under protest during the period from April 1, 1983 to October 20, 1986. While the application claiming refund was pending, Section 11-B was substantially amended with effect from September 20, 1991. By the same amendment, certain other provisions were also inserted in the Act including Sections 12-B and 12-C. Section 12-B provided for presumption that the incidence of duty has been passed on to the buyer. Section 12-C provided for the establishment of consumer welfare fund. It is not in dispute that these provisions were applicable to the pending applications of refund. Under Section 11-B as amended, refund could not be granted if the duty had been passed on to the customer. Under this provision, it was for the appellant to establish that the amount of duty of excise in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty had not been passed by him to any other person.

The respondent issued to the appellant a show cause notice dated January 6, 1992 calling upon it to show cause why the amount of refund claimed by the appellant should not be credited to the consumer welfare fund in terms of Section 11-B read with Section 12-C. The appellant filed a reply to the show cause notice. The respondent, however, by order dated March 25, 1994 directed that the sum of Rs.5,41,499/- be credited to the consumer welfare fund under Section 12-C of the Act. This order was challenged by the appellant by filing a writ petition in the High Court which was dismissed by the judgment and order under appeal.

The questions involved in the appeal are no more res integra after the decision of nine judges' bench in Mafatlal Industries Ltd. & Ors. v. Union of India & Ors. [(1997) 5 SCC 536]. Learned counsel for the appellant has, however, contended that the present case was outside the provisions of the Act as the RF solution was not 'goods' within the meaning of the Act that having been finally decided in appellant's favour in terms of the order of the Tribunal dated September 25, 1990, and, therefore, the receipt and retention of the amount of the excise duty was totally without the authority of law and without jurisdiction. Such a claim of refund, it was contended, can be entertained as held in Mafatlal Industries' case in paragraph 108(ii) in the following words:

"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."

For more than one reason we find it difficult to accept the contention. Firstly the present is not a case of an unconstitutional levy as contemplated by the nine judges' bench decision. That is where a provision of the Act under which tax is levied is struck down as unconstitutional for transgressing constitutional limitations. It is this class of cases where the claim for refund was held to be outside the purview of the Act which for sake of convenience it was called as 'unconstitutional levy' in Mafatlal Industries' case.

Secondly, assuming it to be a case of unconstitutional levy still the appellant would not be entitled to refund in terms of law settled by the Mafatlal Industries' case. Even in that eventuality it has to be established that incidence of duty has not been passed on to others. It has been held that whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the requirement that the burden of duty has not been passed on to others. It was not submitted before us that this requirement had been fulfilled by the appellant. Thus, looking from any angle, the appellant is not entitled to refund.

For the aforesaid reasons, the appeal is dismissed. The parties are left to bear their own costs.

.....CJI.
[S.P. Bharucha]

.....J.
[Y.K. Sabharwal]

.....J.
[Brijesh Kumar]

November 7, 2001