(2005) 03 MAD CK 0044

In the Madras High Court

Case No : R.C.P. No. 8 of 2003

Commissioner of Central Excise APPELLANT

Vs

ITC Ltd. RESPONDENT

Date of Decision : 21-03-2005

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35H(1)

Citation : (2005) 185 ELT 114 : (2005) 2 MLJ 158

Hon'ble Judges : Markandey Katju, C.J;F.M. Ibrahim Kalifulla, J

Bench : Division Bench

Advocate : K. Veeragahavan, SCGSC, for the Appellant; L. Mythili, for the Respondent

Final Decision : Dismissed

Judgement

Markandey Katju, C.J.—This is a reference application on behalf of the revenue u/s 35H(1) of the Central Excise Act, 1944, by which the

following questions have been sought to be referred to us for our opinion.

1. Is the Hon''ble Tribunal right in holding that the payment of duty vide PLA No. 580 dated 27.10.92 has not been paid voluntarily?

2. Can the letter OC. No. 1124/97 dated 02.09.92 of the Superintendent of Central Excise asking the assesses to reverse an amount of

Rs.5,98,000/- being irregular Modvat credit availed, and other correspondences in continuation, be considered to have raised a dispute since it is

not a SCN issued u/s 11A? Can the Action of the assessee debiting the said amount vide PLA No. 580 dated 27.10.92 be considered payment

under protest since no letter filed on that date giving any grounds for payment under protest and subsequently also filed no representation for

payment made under protest as per sub-rule 5 of Rule 233B?

3.Can the letter of protest dated 31.10.92 filed by the assessee can have the retrospective effect of filing protest under Rule 233B?

2. Heard the learned counsel for the parties.

3. The facts of the case have been given in the judgment of CEGAT dated 26.04.2002, by which the CEGAT set aside the order of the

Commissioner (Appeals), who had rejected the assesse''s claim for refund. The CEGAT by its order directed that the refund be given to the

assessee, unless the duty has been passed on to the consumer.

4. The assessee is engaged interalia in the manufacture of Printed Cartons at its factory at Thiruvottiyur, Chennai. It avails modvat credit on various

inputs used in the manufacture of printed cartons. Some of the printed cartons are exported without payment of duty under Rule 191BB of the

Central Excise Rules, 1944. The revenue was of the opinion that the assessee was not entitled to modvat credit on inputs used in the manufacture

of printed cartons, which were removed without payment of duty under Rule 191BB. On repeated request of the department, the assessee

expunged the credit so taken on 27.10.92, even though it contended that the credit availed by it was in accordance with law. Within three days

thereafter, i.e., on 30.10.92, the assessee intimated the department that this payment was made ?under protest?. Subsequently, the department took

a view that the inputs used by the assessee for manufacture of goods cleared under Rule 191 BB for exports were entitled to modvat credit.

Accordingly, the assessee filed a refund claim for Rs.5,98,944/- on 25.7.95, which had been expunged on 27.10.92. The refund claim was

rejected on the ground that the same was time barred u/s 11B of the Central Excise Act, 1944.

5. Section 11B of the Central Excise Act, 1944, as it stood at the relevant time, provided for a period of limitation of 6 months for filing refund

claims. However, the proviso to Section 11B(1) states that the above limitation shall not apply where any duty has been paid under protest.

6. The stand taken by the Department was that since the assessee expunged the credit on 27.10.92 without any protest on that date, the refund

claim made by it was barred by limitation and the proviso to Section 11B(1) does not apply.

7. The Tribunal reversed the judgment of the Commissioner (Appeals), and held

that the payment made by the assessee was under protest, and

hence there was no limitation to the claim for refund.

8. The Tribunal on a consideration of the facts observed that the question whether the payment vide PLA No. 580 dated 27.10.92 was under

protest or not has to be determined after taking into accounts all the facts and circumstances. From the records it appeared that the amount had

not been paid voluntarily, but only after several correspondences between the assessee and the revenue in which the assessee had been urging that

they are entitled to the benefit of the notification No. 33/90 (NT), and that they were also entitled to modvat credit against their despatches. The

Tribunal had noted that in similar circumstances, in the case of 1990 (30) ECR 392 , it was held that the payment in that case was made under

protest, and this verdict was also confirmed by the Supreme Court. Similarly in Executive Engineer, Workshop Division, Madhya Pradesh

Electricity Board v. C.C.E, Raipur, 1997 (95) ELT 445, the Supreme Court observed that the earlier letter of protest for taking out the licence

could be considered as a protest for payment of duty.

9. Mr. K. Veeraraghavan, learned senior Central Government Standing Counsel appearing for the Department, relies on paragraphs 93 & 94 of

the judgment of the Constitution Bench of the Supreme Court in Mafatlal Industries Limited v. Union of India, 1997 5 SCC 537. We have

carefully perused paragraph-94 of the judgment, and in our opinion does not help the case of the Department. The observation in the said

paragraph ?any person paying the duty under protest has to follow the procedure prescribed by the rule? does not mean that Rule 233-B could be

construed in a narrow, pedantic or hyper technical manner. In our opinion Rule 233-B, as interpreted by the decisions of the Supreme Court

referred to above, only mean that substantively there has to be a protest in writing. In the present case, the CEGAT has admitted the

correspondences between the assessee and the revenue, and in our opinion that is the substantive protest in writing.

10. On considering all the circumstances, the CEGAT held that the payment of duty in the present case in PLA No. 580 dated 27.10.92 was

under protest.

11. As regards the plea of unjust enrichment, the Tribunal observed that if the

assessee could show that the duty had not been passed on to the

consumer in this case, it would be entitled to refund.

12. We agree with the view taken by the Tribunal. Whether duty has been paid under protest or not is basically a question of fact, and this Court in

a reference cannot ordinarily interfere with findings of fact, unless they are based on no evidence or perverse. In our opinion, the findings of the

Tribunal cannot be said to be based on no evidence or to be perverse.

13. Mr. K. Veeraraghavan, learned senior Central Government Standing Counsel appearing for the Department has relied on Rule 233-B of the

Central Excise Rules, which states: -

233-B. Procedure to be followed in cases where duty is paid under protest:-

(1)Where an assessee desires to pay duty under protest he shall deliver to the proper officer a letter to this effect and give grounds for payment of

the duty under protest.

(2)On receipt of the said letter, the proper officer shall give an acknowledgment to it.

(3)The acknowledgment so given shall, subject to the provisions of sub-rule (4), be the proof that the assessee has paid the duty under protest

from the day on which the letter of protest was delivered to the proper officer

14. In our opinion Rule 233B cannot control the full effect of the proviso to Section 11B(1). A rule made under the Act cannot limit a provision in

the Act itself. It is well settled that a rule made under an Act will not be valid if it conflicts with or is in derogation to a section in the Act vide (

Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar, . Hence a rule should not be construed in a manner that it conflicts with a

Section of the Act.

15. The Supreme Court has been consistently taking the view that the procedure under Rule 233B should not be treated in an over technical

manner. In India Cements Ltd. Vs. Collector of Central Excise, , the Supreme Court observed:-

A perusal of the letter dated June 11, 1974 clearly shows that all possible contentions which could be raised against the levy of duty on the value

of packing material were raised. If this could not be said to be a protest one fails to understand what else it could be. It does not require much time to analyse the contents of the letter. 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 holding 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.

16. In the present case, the Tribunal has found that there were several correspondences between the assessee and the revenue, in which the

assessee had been urging that they are entitled to the benefit of notification No. 33/90 (NT), and that they are also entitled to modvat credit against

their despatches. Hence, the facts of the decision of the Supreme Court in India Cements Ltd. v. Collector of Central Excise (supra) are similar to

the facts of the present case.

17. In Indian Piston Limited Vs. The Collector of Central Excise, the Supreme Court observed that Rule 233B of the Central Excise Rules does

not prescribe any particular form of protest.

18. In Ex. Engr., Workshop Divn., M.P. Electricity Board v. C.C.E., Raipur (supra) the facts were that the Inspector of Central Excise wrote a

letter to the Divisional Engineer, Central Workshop of the Electricity Board stating that since the factory of the Electricity Board had not yet been

licensed under the Central Excise Act and the Rules to manufacture the said goods the Divisional Engineer at the Central Workshop was requested

to supply the particulars in respect of the goods manufactured in the factory. The said details was sought in order to enable the Excise authorities to

recover the excise duty on the goods that were being manufactured in the Central Workshop which according to him were liable for payment of

excise duty. In reply to the said letter, the Divisional Engineer, Central Workshop, in his letter dated 30.11.1975 took the stand that the Central

Workshop at Bhilai was undertaking the fabrication of transmission line towers and the sub-station structures and Line Hardware materials in

connection with the power supply in the State of Madhya Pradesh and that the provisions of the Central Excise Rules regarding obtaining licence

and payment of excise duty may not be applicable to the Central Workshop. On these facts, the Supreme Court observed:-

A narrow interpretation of the said letter would give the impression that the Divisional Engineer was only lodging his protest against obtaining a licence. But, in our opinion, the said letter has to be read as a whole in the context in which the requirement for obtaining licence was being insisted,

namely, that the goods manufactured at the Central Workshop were leviable to excise duty under T.I.68, which liability was disputed by the

Divisional Engineer. The letter of the Divisional Engineer dated November 30, 1975 must, therefore, be construed to mean that protest was lodged

in the said letter both against obtaining the licence as well as against liability to payment of excise duty. In these circumstances, we are unable to

agree with the Tribunal that payment of duty was not made under protest. On that view of the matter the impugned judgment of the Tribunal cannot

be upheld and has to be set aside.

19. Thus, it is well settled that the meaning of the words ""under protest"" must not be taken in a narrow and pedantic manner. An overall view of the

matter has to be taken, and hence we are of the opinion that the Tribunal has taken a correct view considering the facts and circumstances of the

case.

20. In view of the above, we find no merits in this reference petition and it is accordingly rejected.