

(2003) 06 MAD CK 0131
In the Madras High Court
Case No : Writ Petition No. 11260 of 1996

DCW Ltd.

APPELLANT

Vs

Assistant Commissioner of Customs

RESPONDENT

Date of Decision : 25-06-2003

Acts Referred:

Customs Act, 1962 — Section 27

Citation : (2003) ECR 392 : (2003) 157 ELT 510

Hon'ble Judges : C. Nagappan, J

Bench : Single Bench

Advocate : P.S. Raman, for the Appellant; K. Kumar, ACGSC, for the Respondent

Final Decision : Dismissed

Judgement

C. Nagappan, J.—The petitioner has sought for issuance of writ of certiorarified mandamus for quashing the proceedings of the respondent in Order No. S59/MISC/60/95 Gr. III, dated 8-2-1996 and direct the respondent to refund the sum of Rs. 3,48,613.50 paid by mistake.

2. The petitioner-company is engaged in the manufacturing of industrial chemicals among other things and it imported HCL Synthesis Spares under Bill of Entry, dated 20-1-1994. The petitioner claimed classification of the imported items as falling under Ch. 8417.90. The respondent department assessed the goods under Heading 6903.10, as a result of which the petitioner was constrained to make excess payment of customs duty amounting to Rs. 5,12,462/-, which was based on the order of the respondent, dated 7-6-1994. Against the classification, the petitioner preferred an appeal to the Collector of Customs (Appeals) and the appellate authority set aside the order of the respondent, dated 7-6-1994 and classified the goods under sub-heading 8417.90 and that order became final.

The petitioner filed refund application on 12-4-1995 claiming a sum of Rs. 5,92,642.95 with the respondent and after exchange of correspondence, the

petitioner reduced his refund claim to Rs. 3,48,613.50, since the petitioner had taken Modvat credit on the countervailing duty involved. The respondent by his order, dated 8-2-1996, rejected the refund claim of the petitioner as time-barred in terms of Section 27(1) of the Customs Act, 1962 (in short "the Act"). According to the petitioner, the items being imported of capital equipments, the question of passing of burden to the consumers does not arise and there is no question of unjust enrichment by the petitioner. As the petitioner paid the excess duty under wrong classification order of the Assessing Authority, the excess payment has to be refunded to the petitioner on account of the appeal being allowed. The petitioner has further stated that the refund of duty so paid is a matter of right to the petitioner and the question of applying Section 27 of the Act does not arise, since the petitioner has applied for refund immediately on receipt of the order of Collector of Customs (Appeals).

3. The respondent in his counter has stated that the petitioner claimed classification under Heading 8417.90 for the spare parts imported and the respondent classified it under Ch. 6903.10 and as per the demand of the respondent, dated 7-6-1994, duty was paid by the petitioner and the goods were cleared. The petitioner preferred appeal and the Collector of Customs (Appeals), in his order dated 15-3-1995, set aside the order of the respondent. The petitioner filed his refund application by his letter, dated 4-10-1995 and it was received by the respondent on 10-10-1995 only and after departmental queries, the petitioner admitted that he had availed "Modvat on CVD" and reduced his claim from Rs. 5,92,642.95 to Rs. 3,48,613.50. When a claim is filed u/s 27 of the Act, it is governed by the conditions prescribed therein. Section 27 stipulates that the application for refund should be made before the expiry of six months from the date of payment of duty and the limitation shall not apply where any duty has been paid under protest. The petitioner did not pay the duty under protest as he accepted the classification at that time. The rejection of refund claim as time-barred is proper.

4. Heard both sides.

5. The petitioner imported spare parts under Bill of Entry, dated 20-1-1994 and claimed classification under Heading 8417.90. The respondent classified it under Ch. 6903.10 and as per the demand of respondent, dated 7-6-1994, the petitioner paid the duty and the goods were cleared. It is not disputed that the petitioner did not protest the duty while paying it. It is no doubt true that the petitioner preferred appeal against the classification and the Collector of Customs (Appeals) allowed the appeal and classified the goods under sub-heading 8417.90, as claimed by the petitioner, in his order, dated 15-3-1995.

6. Mr. P.S. Raman, the learned Counsel for the petitioner, contends that the petitioner had paid the customs duty as imposed by the Assessing Authority and that order has been set aside in the appeal and as such, the excess payment of duty made by the petitioner has to be refunded and the petitioner has applied for refund immediately on receipt of the appellate order. Mr. K. Kumar, Additional

Central Government Standing Counsel, per contra, contends that the petitioner did not pay the duty under protest originally, as he accepted the classification at that time and hence, the limitation period of six months as contemplated u/s 27 of the Act would apply to the claim for refund of duty and the dismissal of the claim of the petitioner as time-barred is valid in law.

7. Section 27 of the Act provides for claim for refund of duty and it is extracted.

"27. Claim for refund of duty - (1) Any person claiming refund of any duty and interest, if any, paid on such duty :-

(a) paid by him in pursuance of an order of assessment; or

(b) borne by him,

may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs :-

(a) in the case of any import made by any individual for his personal use or by government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months,

from the date of payment of duty and interest, if any, paid on such duty, in such form and manner as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 28C as the applicant may furnish to establish that the amount of duty and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person;

PROVIDED that where an application for refund has been made before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section and the same shall be dealt with in accordance with the provisions of Sub-section (2).

PROVIDED FURTHER that the limitation of one year or six months, as the case may be, shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.

PROVIDED ALSO that in the case of goods which are exempt from payment of duty by a special order issued under Sub-section (2) of Section 25, the limitation of one year or six months, as the case may be, shall be computed from the date of issue of such order.

....."

8. The section stipulates that any person claiming refund of any duty paid by him in pursuance of an order of assessment may make an application for refund of such duty to the authority before the expiry of one year in case of import made by individual for personal use or by Government, etc. and in any other case before the expiry of six months from the date of payment of duty. The second proviso stipulates that the limitation of one year or six months as the case may be shall not apply where any duty has been paid under protest. Barring payment of duty paid under protest, for all other claims for refund of duty, the limitation period of one year or six months as the case may be will apply.

9. Insofar as the present case is concerned, the import of machinery is not by any individual or by Government or educational or charitable institution and hence the limitation for making claim of refund of duty is before the expiry of six months from the date of payment of duty. Admittedly, the petitioner has not paid the duty under protest and the second proviso will not apply to the case of the petitioner. During the course of argument, Mr. P.S. Raman, learned Counsel for the petitioner, referred to the decision of Apex Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, . The Constitutional Bench of the Supreme Court, while dealing with the claim for refund u/s 11B of the Central Excise Act, has held as follows :

"83..... The second proviso to Section 11B (as amended in 1991) expressly provides that "the limitation of six months shall not apply where any duty has been paid under protest". Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other aspect. If one reads the second proviso to Sub-section (1) of Section 11B along with the definition of "relevant date", there is no room for any apprehension of the kind expressed by the learned counsel.

84.

85. The rule no doubt requires the assessee to mention the "grounds for payment of the duty under protest" but it does not empower the proper officer, to whom the letter of protest is given, to sit in judgment over the grounds. The assessee need not particularise the grounds of protest. It is open to him to say that according to him, the duty is not exigible according to law. All that the proper officer is empowered to do is to acknowledge the letter of protest when delivered to him and that acknowledgement shall be the proof that the duty has been paid under protest. A reading of the rule shows that the procedure prescribed therein is evolved only with a view to keep a record of the payment of duty under protest. It is meant to obviate any dispute whether the payment is made under protest or not. Any person paying the duty under protest has to follow the procedure prescribed by the Rule and once he does so, it shall be taken that he has paid the duty under protest. The period of limitation of six

months will then have no application to him.

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....."

Their lordships of the Supreme Court have held that where a person proposes to contest his liability by way of appeal, revision or in the higher Courts, he would naturally pay the duty under protest and it is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification and the assessee need not particularise the grounds of protest and it is open to him to say that the duty is not exigible according to law and the acknowledgement of the letter of protest shall be the proof to show that duty had been paid under protest and in that case, the period of limitation of six months will have no application to him. The Apex Court has further held that where the duty is paid under the orders of Court pending an appeal/reference/writ petition, it will certainly be a payment under protest and in such a case it would not be necessary to lodge the protest.

10. Admittedly, in the present case, the petitioner has not made the payment of duty under protest and in that case, the period of limitation of six months will apply to the petitioner and the claim not being made within a period of six months from the date of payment has been rightly rejected by the respondent.

11. There are no merits in the writ petition. The writ petition is dismissed. No costs.