

(2015) 07 AHC CK 0157

In the Allahabad High Court

Case No : Central Excise Appeal No. 235 of 2005

Denajee Sansthan

APPELLANT

Vs

Commissioner of Central Excise, Meerut

RESPONDENT

Date of Decision : 14-07-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11-B, 11B(1), 11-B(1), 11D
Constitution of India, 1950 — Article 226

Citation : (2015) 7 ADJ 637

Hon'ble Judges : Tarun Agarwala, J;Surya Prakash Kesarwani, J

Bench : Division Bench

Advocate : Rishi Raj Kapoor and Krishna Agrawal, for the Appellant; B.K.S. Raghuvanshi, J.N. Sharma and K.C. Sinha, Advocates for the Respondent

Judgement

Tarun Agarwala, J—The appellant is a charitable society registered under the Societies Registration Act and is also registered under the U.P. Khadi Gramodyog Board. The appellant also claims to be registered as a small scale unit and, one of its activities is, manufacturing of Satritha Herbal Shampoo and Neem Shampoo for supply to the Khadi and village industry. According to the appellant, the shampoo manufactured by them is eligible for exemption of duty as per Notification No. 140/85-CE dated 5th May, 1983 as amended from time to time. On the other hand, the Central Excise department was classifying the said shampoo under Tariff Chapter sub-heading No. 3305.99, Chapter 33 of the Central Excise Tariff Act, 1985. Since there was a dispute with regard to the classification of the product and the appellant was not agreeing to the stand of the department, the appellant accordingly, filed a declaration under Rule 173B of the Central Excise Rules, 1944 (hereinafter referred to as the Rules) in the prescribed proforma. In the remark column, the appellant mentioned:

"We do not agree with the contention of the department that our product is classifiable under sub-heading 3305.99. Therefore, we shall pay duty whatever is applicable on product under protest under Central Excise Rule 233B for which we

have filed separately a letter to this effect to the Assistant Commissioner, Central Excise Moradabad."

In addition to the above, the appellant issued a letter dated 24th December, 1996 to the Assistant Commissioner, Central Excise Division, Moradabad indicating that the manufacture of shampoo does not attract central excise duty under Chapter heading 3305.99 and the conclusion drawn by the Central Excise department treating the said product as an excisable good was not tenable in law. The appellant in the said letter accordingly prayed that they may be permitted to avail the provisional assessment to duty under Rule 9B of the Rules till the case was finally decided. The appellant also informed the authority that in order to resume their business of manufacture of the said product and also to comply with the requirement of Central Excise Rules they were submitting the declaration of goods under Rule 173B of the Rules under protest. The letter was accompanied by the said declaration form, which was duly received by the Assistant Commissioner. For facility, the letter dated 24th December, 1996 issued by the petitioner to the Assistant Commissioner, Moradabad is extracted hereunder in extenso:

"From:

DENAJE SANSTHAN 39, Malviya Nagar, Moradabad.

To

The Assistant Commissioner, Central Excise Division, Moradabad.

Through : The Superintendent, Central Excise Range-2, Moradabad. Dear Sir,

We have been granted Registration Certificate No. 2806023250-A-1/Ch33/01/96dt. 13.12.1996 under Rule 174 of Central Excise Rule, 1944 with reference to our application dated 13/14.11.1996, which was submitted for the purpose of carrying on our business stopped suddenly by effecting seizure on 19.9.1996 by Central Preventive Staff of Moradabad of our stock of Shampoo (Sathriha, Neem and Herbal Types) manufactured out of raw materials of Sikakai, Amla Ritha without use of power or machines. The applicant is a Registered Charitable Society under the Societies Registration Act and has also been registered with U.P. Khadi & Gramodyog Board to collect Jari Buti to carry on the business for manufacture of Sathriha Herbal Shampoo and Neem Shampoo as village Industry from 22.5.89 for supply to the Khadi & village industry.

The aforesaid product therefore does not attract Central Excise duty under Chapter Heading 3305 or sales Tax or any other tax and the conclusion drawn by the Seizing Officers by treating the aforesaid product manufactured out of Sikakai, Amla and Ritha as excisable goods is therefore not tenable under law. Even the Supreme Court of India in its judgment dated 22.8.1972 passed in Civil Appeal No. 37 of 1969 has held that shampoo is a liquid soap, falling under Chapter Heading 34.01. Accordingly, there was no controversy about classification of the product the applicant sought remedy under article 226 of

Constitution by filing a writ before the Hon''ble High Court Allahabad on 30.10.1996 which has since been admitted. It was claimed therein that as the product in question is one of the items of Khadi and Village raw materials namely Sikakai, Amla and Ritha, no central excise duty is payable and the same is sub-judice.

3. In order to resume the business of the manufacture and sale of the above product, and also to comply with the requirements of Central Excise Rules, 1944 we are submitting herewith the declaration of goods produced or manufactured in terms of Rule 173-B of the Central Excise Rules, 1944 for favour of necessary action at your end.

4. As under the above circumstance, it is not possible to determine the correct classification of the goods in question which in our opinion attracts nil rate of duty (being exempted category), it is requested to permit us to avail the provisional assessment to duty under Rule 9B of Central Excise Rules, 1944 till our case is finally decided.

Yours faithfully (DENA JEE SANSTHAN) Ends : Declaration in Triplicate. Dated : 24.12.96"

2. On 3rd February, 2000, the appellant filed an application for refund of Rs. 9,68,931/- for the period 1st January, 1997 to 31st January, 1998 on the ground that the appellant was entitled for exemption at concessional rate of duty vide Notification No. 140/83-CE dated 5th May, 1983. Upon receipt of the said application, the Deputy Commissioner, Central Excise, Moradabad issued a show cause notice dated 25th August, 2000 observing that the appellant collected the duty paid from their customers and, therefore, it was a case of unjust enrichment and that the appellant was not entitled for any refund. The authority consequently, directed the appellant to show cause as to why the claim of refund should not be rejected under Section 11B and 11D of the Central Excise Act, 1944 (hereinafter referred to as the Act). The appellant replied to the show cause notice explaining that they have not recovered the duty from their buyers. In support of their submission, the appellant filed proof indicating that duty was paid by them under protest.

3. The Deputy Commissioner passed an order in original dated 5th December, 2000 rejecting the claim of the appellant for refund on the ground that the claim was barred by limitation as well as it was a case of unjust enrichment. The appellant, being aggrieved, preferred an appeal before the Commissioner (Appeals), who rejected the appeal by an order dated 27th May, 2004 on the ground that the appellant had not followed the procedure as prescribed under Rule 233B of the Rules nor had intimated the department about their intention to do so. The appellant, being still aggrieved, filed an appeal before the Central Excise and Service Tax Appellate Tribunal, which was rejected by the impugned order dated 17th March, 2005. The appellant, being aggrieved, filed the present appeal under Section 35G of the Act, which was admitted on the following

substantial question of law, namely:

"(i) Whether on the facts and in the circumstances of the case, the Tribunal is legally justified in disallowing the claim of refund of Excise Duty as time barred due to non filing of formal protest letter?

(ii) Whether on the facts and in the circumstances of the case, the Tribunal is legally justified in rejecting the claim of protest made, in the declaration of Classification of Rule 173-B and request for provisional assessment, as a protest letter under Rule 233B of the Central Excise Rules, 1944?"

4. We have heard Sri Rishi Raj Kapoor, the learned counsel for the appellant and Sri B.K.S. Raghuvanshi, the learned counsel for the Department.

5. Under Section 11B of the Act, a person can claim refund of any duty within a prescribed period. The second proviso to Section 11B of the Act stipulates that the limitation of six months for filing the refund claim would not apply where any duty has been paid under protest. According to the appellant, an application was filed indicating that they had deposited the amount under protest and, therefore, the application for refund was not only maintainable but was also within the period of limitation. It was urged that the authorities committed an error in rejecting the claim initially on the ground of limitation and, thereafter, on the ground that the procedure prescribed under Rule 233B of the Rules was not followed.

6. The Deputy Commissioner rejected the refund claim of the appellant on the following grounds:

"The letter dt. 24.12.1996 which party has claimed as their letter of protest, they had request only for provisional assessment under Rule 9B and not for duty under protest under Rule 233-B. The party in their declarations under Rule 173-B dt. 31.12.96, has only mentioned the classification dispute whereas in their refund application they have claimed SSI benefits under Notfn. No. 140/83-CE dt. 5.5.83. Follow with the ratio of CETAT's judgment in Jain Ceramics Industry v. CCE, 1995 (78) ELT 186 , followed in Workwell Engineering Co. vs. Collector of C. Excise 1994 (53) ECR 585 , their refund claim is not maintainable on the grounds that they have not claimed any SSI benefit in their 173-B declaration dt. 31.12.1996 and nor in their letter dt. 24.12.96."

7. The Commissioner (Appeals) rejected the appeal holding:

"The appellant's plea is that the duty was paid under protest the refund is not time bar. I have perused the letter dated 24.12.96 which they stated was given to the department intimating payments under protest.

A perusal of the letter shows that they have requested the department for provisional assessment under Rule 9B as they do not agree with the classification of the product and had filed a writ in the Hon"ble High Court of Allahabad. This letter nowhere states that as they were denied the SSI exemption they are

paying duty under protest, a plea they have taken in the appeal before me. They did shown me RT-12's etc. stamped with the paid under protest but this does not fulfill the requirements of Rule 233B of the Central Excise Rules. They have to inform the department in writing that they intend to pay duty under protest and the grounds for doing so. Apparently they have not done so. The Hon"ble Supreme Court in the case of Mafat Lal Industries v. UOI, 1997 (89) ELT 24, had stated. "A reading of the rule (Rule 233B) 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 duty under protest has to follow the procedure prescribed by the Rule and once he does so, it shall be taken that he had paid the duty under protest. The period of limitation of six months will then have no application to him."

It is apparent and accepted by the appellants they have not followed the procedure under Rule 233B nor intimated to the department about their intention to do so.

The refund claim is therefore correctly rejected as time barred."

8. The Tribunal rejected the appeal and the claim of the appellant holding:

"I have considered the submissions made by both the sides, I find that under Rule 233B of the Central Excise Rules, 1944, it was mandatory for the appellants to file a protest letter and give the grounds on which the protest is being lodged and obtain an acknowledgement of the letter of protest. Once the protest is lodged, the depart is duty-bound to pass an order on the protest letter. Since the appellants had not filed protest letter before the competent authority for passing any order, therefore, they cannot claim that they are paying the duty under protest and take benefit of the limitation prescribed for filing the refund claim. I therefore, find no merits in the appeal filed by the appellants and uphold the order of the Commissioner (Appeals). The appeal is rejected."

9. The upshot of the orders of all the authorities is, that no protest letter as per the procedure prescribed under Rule 233B of the Rules was filed by the appellant and that it was mandatory for the appellant to lodge a protest letter as prescribed under Rule 233B of the Rules. Since the same was not done, the appellant was not entitled for the refund and that the said application was barred by limitation.

10. In order to appreciate the submission of the learned counsel for the parties, it would be essential to peruse Section 11B of the Act. For facility, the said provision is extracted hereunder:

"11B. Claim for refund of duty.--(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of

one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in Section 12A as the applicant may furnish to establish that the amount of duty of excise 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.....

Provided further that the limitation of six months shall not apply where any duty has been paid under protest."

11. A perusal of the aforesaid provision indicates that any person claiming refund may make an application for refund before the expiry of six months from the relevant date, in such form and manner as may be prescribed and that the application shall be accompanied by such documentary or other evidence to establish that the amount of duty was collected and paid by the appellant and had not been paid by him to any other person. The second proviso makes it clear that the limitation of six months would not apply where any duty has been paid under protest.

12. The procedure for applying for a refund has been prescribed under Rule 233B of the Rules. For facility, the said provision is extracted hereunder:

RULE 233B. 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 acknowledgement to it.

(3) The acknowledgement 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.

(4) An endorsement "Duty paid under protest" shall be made on all copies of the gate pass, the Application for Removal and Form R.T.12 or Form R.T. 13, as the case may be.

(5) In cases where the remedy of an appeal or revision is not available to the assessee against any order or decision which necessitated him to deposit the duty under protest, he may, within three months of the date of delivery of the letter of protest, give a detailed representation to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise.

(6) In cases where the remedy of an appeal or revision is available to the assessee against an order or decision which necessitated him to deposit the duty

under protest, he may file an appeal or revision within the period specified for filing such appeal or revision, as the case may be.

(7) On service of the decision on the representation referred to in sub-rule (5) or of the appeal or revision referred to in sub-rule (6) the assessee shall have no right to deposit the duty under protest:

Provided that an assessee shall be allowed to deposit the duty under protest during the period available to him for filing an appeal or revision, as the case may be, and during the pendency of such appeal or revision, as the case may be.

(8) If any of the provisions of this rule has not been observed, it shall be deemed that the assessee has paid the duty without protest.

Note.--A letter of protest or a representation under this rule shall not constitute a claim for refund."

13. A perusal of the aforesaid rule indicates that where an assessee desires to pay duty under protest, he shall deliver to the proper officer a letter to this effect. No format of the letter has been prescribed and, therefore, the format of the letter has been left to the assessee. According to the appellant, a protest letter had been given and, therefore, they had complied with the necessary requirement as stipulated under Rule 233B of the Rules. On the other hand, the stand of the revenue is that the appellant has not followed the requirement of law as prescribed under Rule 233B of the Rules and, therefore, they are not entitled to claim any refund. According to the revenue, the letter and the declaration form submitted by the appellant does not amount to lodging a protest nor does it mean that the procedure prescribed under Rule 233B had been followed. The contention of the revenue is that it cannot be said that the appellant had made the payment of duty under protest after following the procedure prescribed by the Rules.

14. Having heard the learned counsel for the parties, we find that in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, (2002) 83 ECC 85 : (1997) 68 ECR 273 : (1997) 89 ELT 247 : (1996) 11 JT 283 : (1996) 9 SCALE 457 : (1997) 5 SCC 536 : (1996) 10 SCR 585 Supp : (1998) 111 STC 467 , the Constitution Bench of the Supreme Court held that any person paying duty under protest has to follow the procedure prescribed by the Rules. The Supreme Court held:

"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 under 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. This 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."

15. In Commissioner of Central Excise Vs. ITC Ltd., (2005) 185 ELT 114 : (2005) 2 MLJ 158 , the Madras High Court held that Rule 233B cannot be construed in a narrow or hyper technical manner and only a substantial compliance thereof would be sufficient to show that protest had indeed be lodged. The Court observed:

".....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 233B could be construed in a narrow, pedantic or hyper technical manner. In our opinion Rule 233B, 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."

Further observed:

"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, AIR 1969 SC 1068 : (1969) 74 ITR 41 : (1969) 1 SCC 591 : (1969) 3 SCR 818 , Hence, a rule should not be construed in a manner that it conflicts with a Section of the Act."

16. In Indian Piston Limited Vs. The Collector of Central Excise, AIR 1990 SC 977 : (1990) 27 ECC 1 : (1990) 46 ELT 3 : (1990) 1 JT 99 : (1990) 1 SCALE 79 : (1990) 1 SCC 470 : (1990) 1 SCR 157 : (1990) 1 UJ 363 , the Madras High Court held:

"10. Mr. Ganguly next drew our attention to Rule 233-B of the Central Excises Rules, 1944 which lays down the procedure to be followed when duty is paid under protest. The provisions of this rule, however, are of no relevance here because it has not been pointed out to us as to how the appellant has failed to observe this rule in any particular regard so that the provisions of clause 8 of the

rule can come into effect. This rule does not prescribe any particular form of protest and hence it is not possible to say on the basis of this rule that the appellant-assessee in this case must be deemed to have paid the duty without protest."

17. In view of the principles of law enunciated above, we find that in the instant case, the appellant had specifically indicated in the declaration form under Rule 173B that they are paying the duty under protest, which was part of their letter dated 24th December, 1996 in which the appellant had categorically insisted that no duty was payable on the product manufactured by them.

18. The language and content of the letter dated 24th December, 1996 read with the declaration form as reproduced above leaves no room for doubt that the appellant had pleaded in unequivocal terms, namely, that duty was not payable on shampoo manufactured by them. The contents of the letter makes it clear that despite the appellant having lodged the protest in the declaration form, the department was insisting on payment of duty on the manufacture of shampoo and hence, the appellant had put on record for paying the amount under protest with a further prayer to permit the appellant to avail the provisional assessment to duty under Rule 9B of the Rules till the case was finally decided.

19. In the light of the aforesaid letter and the declaration form, we are of a definite opinion that the appellant had established beyond doubt that the appellant had always been contesting the department's claim for levying duty on the product manufactured by them and regularly agitated that no such duty was payable. In our view, if the appellant was disputing the levy of duty and was agitating that no duty was payable and that payment was being made because of insistence of the department to pay under threat of seizure of the product, it cannot be said that payments made by the appellant was not made under protest. We are of the opinion that the assessee had lodged the protest in accordance with Section 11B of the Act read with Rule 233B of the Rules of 1994.

20. The contention of the respondents that the protest as envisaged under Rule 233B, should have been followed and the procedure prescribed under the said rule had not been followed cannot be accepted. The requirement of Rule 233B of the Rules cannot be construed in a narrow and hyper-technical manner. In our opinion what is required is, that there has to be a protest in writing, which in the present case has been done. Rule 233B of the Rules is procedural in nature and cannot override or control the substantive provision of Section 11-B(1) of the Act since no specific form of protest or format has been provided under the Rules. The appellant in its letter and in the declaration form had recorded his dissent and objection to the levy of duty, which in our opinion was sufficient to term it as depositing the duty under protest.

21. In view of the aforesaid, we find that the Tribunal and the departmental authorities have committed a manifest error in non-suiting the appellant's application for refund on the ground that no protest letter was filed in accordance

with the procedure prescribed under Rule 233B of the Rules. Since we have held that the protest letter was filed by the appellant, the question of the application being barred by limitation under Section 11-B of the Act does not arise. In the light of the aforesaid, the question of law as framed above is answered in favour of the appellant and against the department. The impugned Orders of the Tribunal as well as the order of the Deputy Commissioner and the Commissioner of Appeals are quashed. The appeal is allowed. The matter is remanded to the competent authority to decide the refund application on merits and in accordance with law.