
(2005) 09 KL CK 0001
In the High Court Of Kerala
Case No : W.A. No. 1535 of 2005

Dentifrices

APPELLANT

Vs

The Deputy Commissioner of Central Excise

RESPONDENT

Date of Decision : 08-09-2005

Acts Referred:

Central Excise Rules, 1944 — Rule 233B, 233B(4), 233B(5), 233B(6)
Central Excises and Salt Act, 1944 — Section 11B, 11B(1)

Citation : (2005) 09 KL CK 0001

Hon'ble Judges : K.T. Sankaran, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : T.D. Rajalakshmi and E.R. Venkateswaran, for the Appellant; John Varghese, Assistant Solicitor General, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—Customs, Excise and Service Tax Appellate Tribunal, in short CEGAT, Southern Bench at Bangalore has referred three questions of law as directed by this Court in C.E. Ref. No. 2 of 2003, which we have consolidated and redrafted as follows:

Whether letter dated 12-7-1991 addressed to the Inspector of Central Excise by the applicant would amount to payment of duty under protest so as to render the claim for refund not being hit by the limitation of six months in terms of the proviso to Sub-section (1) of Section 11-B of the Central Excise and Salt Act, 1944?

2. The applicant, M/s Dentifrices, is the manufacturer of tooth paste and tooth powder. They had cleared certain quantity of their product under the brand name "Effermint" by availing the benefits of notification No. 175/86. On the tube and outer packing of the tooth paste, they have inscribed the words "marketed by M/s Tomco, Bombay". Inspector of Central Excise directed the applicant to debit a sum of Rs. 8,89,099 towards differential duty since applicant has used the above words in the microproducts which constituted use of brand name of

another manufacturer who is not eligible for the benefit of exemption under the notification. Direction was duly complied with by the applicant by debiting the said amount in their RG 23 A Pt. II account towards the differential duty and intimated the said fact to the Department by their letter dated 12-7-1991. In the said letter applicant has stated as follows: "the adjustment is made without prejudice to our representing the matter to the higher authorities. Subsequently, they filed a refund claim on 2-6-1992 for the above amount. The Assistant Collector rejected the refund claim of the Appellant on the ground that the refund claim was filed after the statutory time-limit for filing refund claim u/s 11B of the Central Excise & Salt Act, 1944." Applicant aggrieved by the order of the Assistant Collector filed appeal before the Collector of Central Excise. Appeal was rejected stating that the letter does not indicate that the applicant was paying the duty under protest and since they had not complied with the requirement of Rule 233B the refund claim was barred by time. Applicant took up the matter before the CEGAT and the Tribunal also confirmed the finding of the lower authorities and dismissed the appeal.

3. Sri E.R. Venkateswaran, counsel appearing for the applicant submitted that there is a complete misreading of the letter dated 12-7-1991. Counsel submitted that a reading of the above letter would show that applicant had protested and such a protest would fall within the four corners of Rule 233B of the Central Excise Rules. Counsel referred to the several decisions of the apex court, viz., *Samrat International (P) Ltd. Vs. Collector of Central Excise, Hyderabad*, *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, *Coastal Gases and Chemicals Pvt. Ltd. Vs. Assistant Collector of Central Excise, Visakhapatnam and Others*, *M.R.F. Ltd. Vs. Collector of Central Excise, Madras*, *India Cements Ltd. Vs. Collector of Central Excise*, and *Indian Piston Limited Vs. The Collector of Central Excise*, .

4. Sri John Varghese, Assistant Solicitor General and Sri S. Krishnamoorthy, appearing for the Respondent submitted that there is no illegality in the various orders issued. Counsel submitted that the letter dated 12-7-1991 would not satisfy the procedural requirement of Rule 233B of the Rules and consequently Department is justified in rejecting the refund claim. Before we answer the reference, we may refer to Rule 233B of the Central Excise Rules, which reads as follows:

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 be given 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.

(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 13) as the case may be.

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

The question posed is whether letter dated 12-7-1991 would satisfy the procedural requirement laid down in the above-mentioned rule. We may extract the letter dated 12-7-1991 sent by the applicant in response to the letter 265/91 dated 12-7-1991 issued by the Inspector of Central Excise.

Ref. No. DF/CE/32/91 The Inspector of Central Excise, II Sector, Ottappalam

12th July 1991

Sir,

Sub.--Differential duty on account of non applicability of Notfn. No. 175/86 CE dated 1-3-1986 as amended by Notfn. No. 88/90 dated 20-3-1990.

Ref.--That office letter No. 265/91 dated 12-7-1991.

With reference to the above letter No. 265/91 dated 12-7-1991 this is to inform you that we have debited Rs. 2,96,817 as B.E.D. and Rs. 14,841 as S.E.D. being the duty payable for the duty free clearance for the period from 6-8-1990 to 4-9-1990 for Rs. 19,78,787-24 vide debit entry 4/97 dated 12-7-1991 and vide debit entry No. 4/98 dated 12-7-1991, we have also debited Rs. 5,49,944 as

P.E.D. and Rs. 27,497 as S.E.D. being the differential duty payable on goods cleared at concessional rate of duty for Rs. 54,99,438-45 in R.C. 23 A Part II.

Please note that the adjustment is made without prejudice to our representing the matter with the higher authorities.

Kindly acknowledge receipt. Thanking you,

Yours faithfully, For DENTIFRICES, (Sd.) General Manager (Joy Thomas)

In order to understand the purport of letter dated 12-7-1991 sent by the applicant to the Inspector of Central Excise, we may also refer to the letter sent by the Inspector of Central Excise to the applicant.

12-7-1991

To

M/s Dentifrices, Mala Gentleman,

Sub.--C.Ex. Tooth paste and tooth powder. Differential duty on account of application of Notfn. No 175/86--Reg.

On scrutiny of the agreement dated 29-1-90 as entered into by you and the Tata Oil Mills Co. Ltd., Bombay it appears that you are not entitled for the concession applicable as per Notfn. No. 175/86 dated 1-3-1986 as amended by Notfn. No. 88/90 dated 20-3-90 as it would be seen from the explanation No. VIII to the said notification. Taking into account the agreement referred to above and the imprints on the tubes and the tube covers and also other relevant materials used in the marketing of your product, it clearly indicates that there is a strong connection between you and the Tata Oil Mill Co. Ltd., Bombay in the course of trade of the specified goods. You are hereby directed to debit the differential duty on the goods cleared hitherto, as follows:

(1) Duty free clearance to Tata for .. Rs. 19,78,782-24 the period from 6-8-90 to 4-9-90 covering invoices 12 to 20 B.E.D. at the normal rate of 15% .. Rs. 2,96,817-00 5%ofS.E.D. Rs. 14,841-00 .. Rs. 3,11,658-00 (2) Duty paid clearance at concessional.. Rs. 54,99,438-45 rate of duty for the period from 4-9-1990 to 3-12-90 covering G.P. No. 1 to 20 Diff. B.E.D. @ 10% .. Rs. 5,49,944-00 S.E.D. @5% .. Rs. 27,497-00 .. Rs. 5,77,441-00 Total (1+2) .. Rs. 8,89,099-00 The particulars of debits made may be intimated to this office urgently.

Yours faithfully, (Sd.)

Applicant has been specifically informed by the Inspector of Central Excise that applicant is not entitled to concession applicable as per notification dated 1-3-1986 as amended by notification No. 88/90 dated 20-3-1990. Applicant was then directed to debit the differential duty on goods cleared and the amount to be debited was stated to be Rs. 8,89,099. Further letter also stated that the particulars of debits should be intimated to the office urgently. Applicant in their

reply dated 12-7-1991 stated that the applicant has debited the amount as directed by the Department and cautioned the department that the adjustment made was without prejudice to their representing the matter before the higher authorities. Adjustment made by the applicant was conditional and not temporarily. It has been specifically stated though the applicant had made adjustment it was without prejudice to the applicant representing the matter before the higher authorities. Protest has been made by the applicant though adjustment has been made stating that they want to take up the matter before the higher authorities. Applicant has asserted and declared its objection to the direction give by the Inspector of Central Excise stating that they are not accepting the direction without protest. Though they made protest, the word "protest" as such is not seen in Ext. P-1. Reading both the letter issued by the Inspector of Central Excise and the reply given by the applicant together would reveal that the applicant was not accepting the direction without protest.

5. We may in this connection refer to the decision of the Constitution Bench of the apex court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, wherein the apex court examined the scope of Rule 233 B and held as follows:

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 acknowledgment 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.

In *Commissioner of Income Tax, Amritsar Vs. Straw Board Manufacturing Co. Ltd.*, the apex court examined the contents of letter dated 11-6-1974 and held as follows:

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 hold 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.

We may also refer to the decision of the Bombay High Court in Roche Products Ltd v. Union of India 1991 (5) E.L.T. 238. While interpreting Rule 233 B the court held that the rules are procedural and cannot be treated as mandatory.

6. Let us examine the consequence of rejecting the claim of the applicant. Consequence would be that there would be unjust enrichment so far as the Department is concerned. This is not a case where the applicant has taken out or has done anything which is prejudicial to the Revenue. But this is a case where applicant seeks refund and if the request is not accepted considerable prejudice would be caused to the applicant. Applicant in our view has clearly indicated his intention that even though he is adjusting the amount as directed by the Inspector of Central Excise he would take up the matter before the higher authorities, which, in our view, would amount to protest and would fall within the scope of Rule 233 B of the Central Excise Rules. In such circumstances, we are inclined to answer the reference holding that the letter dated 12-7-1991 would satisfy the procedural requirement of Rule 233 B of the Central Excise Rules, 1944. On the basis of our declaration consequential orders would be passed by the Tribunal and other authorities. Since we have allowed the reference application, W.A. No. 1535 of 2005 merits no consideration. The same would stand dismissed.