

(2015) 11 AHC CK 0010

In the Allahabad High Court

Case No : Central Excise Appeal Defective No. 142 of 2010

Indian Farmers Fertilisers Cooperative Limited

APPELLANT

Vs

Commissioner(K-Ii) Central Excise Division

RESPONDENT

Date of Decision : 19-11-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11-B, 11-B(1)
Limitation Act, 1963 — Section 12, 12(2)

Citation : (2016) 331 ELT 386

Hon'ble Judges : Tarun Agarwala and Vinod Kumar Misra, JJ.

Bench : Division Bench

Advocate : Arvind Saran Das, Bharat Ji Agrawal, P. Agrawal and Shubham Agrawal, for the Appellant; R.C. Shukla and Syed Zafar Monnis, for the Respondent

Judgement

1. We have heard Sri Bharat Ji Agrawal, the learned Senior counsel along with Sri Arvind Saran Das and Sri Shubham Agrawal, the learned counsels for the appellant and Sri R.C. Shukla, the learned counsel for the department.

2. The appellant is a manufacturer of fertilizer. One of its raw material is Naphtha which the appellant purchases from Indian Oil Corporation from Mathura. By means of a notification, issued under the Central Excise Act, 1944, excise duty is required to be paid at a concessional rate if Naphtha is purchased for manufacture of fertilizer. The appellant was receiving raw Naphtha at a concessional rate of duty. For the period 08.02.1998 to 11.05.1998, the jurisdictional excise authority did not allow the appellant to purchase raw Naphtha at concessional rate of duty and refused to issue a certificate in Form CT-2. The appellant protested vide letters dated 21.01.1998 and 10.02.1998 and deposited the excise duty vide challan dated 4th February, 1998 indicating that they were depositing the duty under protest. The appellant, thereafter, filed an appeal questioning the action of the department in imposing central excise duty on the purchase of Naphtha and non issuance of Form CT-2. The Tribunal, by a judgment dated 22.01.1999, held that the appellant was eligible to purchase raw

Naphtha duty free. The said decision of the Tribunal became final inter se between the parties since no further appeals were filed.

3. The appellant, thereafter, applied for refund of the duty in terms of the second proviso to Section 11-B of the Central Excise Act, 1944 (hereinafter referred to as "the Act") seeking refund of Rs. 1,22,09,768.74. The authority rejected the claim of the appellant on the ground, that the duty was not paid under protest and that the claim application was preferred after the prescribed period of six months as envisaged under Section 11-B of the Act and, therefore, the claim was barred by time. The appellant, thereafter, preferred an appeal which was also rejected by the Commissioner (Appeals) on the ground that even though the amount was paid under protest, nonetheless, the appellant's claim was beyond the period of six months and was barred by time. The First Appellate Authority held, that the Tribunal's order dated 22.01.1999 was dictated in open Court and, therefore, the appellant was aware of the order from that date itself. The period of limitation would run from 22.01.1999 which had expired as the application was filed on 21.08.1999 after the period of six months and, therefore, the claim was barred by time. The appellant, being aggrieved, thereafter, preferred a second appeal before the Tribunal which was rejected on the ground of limitation. The Tribunal, however, came up with a new ground contending that since the appellant was a buyer, he was not entitled to apply for refund under Section 11-B of the Act. The appellant, being aggrieved, has filed the present appeal which was admitted on the following substantial questions of law:-

"(1) Whether in view of the Constitution Bench decision of Hon'ble the Supreme Court of India in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, since the appellant was contesting the liability for payment of excise duty on the use of Naphtha by way of appeal and the appellants having been compelled to pay the duty in order to get CT-2 certificate, hence the duty shall be deemed to have been paid under protest and in view of the second provision to Section 11B the limitation of six months shall not be applicable in respect of the duty deposited by the appellant?

(2) Whether the Hon'ble CESTAT has erred in deciding the appeal on the ground that the appellant being buyer of excisable goods was not entitled to make deposit under protest, when the Commissioner (Appeals) has held that the appellant had paid the duty under protest as required under the law and the respondent has not appealed or filed across objection against the said finding of the Commissioner (Appeals)?

(3) Whether the Hon'ble CESTAT has failed to appreciate that a buyer who is entitled for exemption from payment of excise duty on the goods liable to be purchased against CT-2 certificates is entitled to make protest while paying duty, in case department denies the benefit of the exemption?

(4) Whether the Hon'ble CESTAT failed to decide the question whether the period of limitation prescribed under Section 11B is applicable in the appellant's case,

when it had paid the duty under protest on purchase of raw Naphtha procured by it?"

4. In this background, we have heard the learned counsel for the parties.

5. Section 11-B of the Act provides, that any person claiming refund of excise duty and interest is required to make an application for refund within six months. The second proviso states that the limitation of six months would not apply where any duty and interest, if any, was paid under protest. The first appellate authority has given a categorical finding that the duty was paid under protest. We also affirm this finding upon a perusal of the letter dated 21.01.1998 which has been considered by the first appellate authority as well as the letter dated 10.02.1998 and the challan dated 04.02.1998 through which the duty was deposited.

6. In view of the aforesaid, it is clear that the amount was deposited under protest. Further, the finding of the first appellate authority has not been challenged by the Department in any further appeal and, therefore, this finding is binding upon them. We are also of the opinion that when the appellant filed an appeal against the duty levied, it means that the deposit was made under protest.

7. A constitutional Bench of the Supreme Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, , held:

"83. It is then pointed out by the learned Counsel for the petitioners-appellant that if the above interpretation is placed upon amended Section 11B , a curious consequence will follow. It is submitted that a claim for refund has to be filed within six months from the relevant date according to Section 11B and the expression "relevant date" has been defined in Clause (B) of the Explanation appended to sub-section (1) of Section 11B to mean the date of payment of duty in cases other than those falling under Clauses (a), (b), (c), (d) and (e) of the said Explanation. It is submitted that Clauses (a) to (e) deal with certain specific situations whereas the one applicable in most cases is the date of payment. It is submitted that the appellate/revision proceedings, or for that matter proceedings in High Court/Supreme Court, take a number of years and by the time the claimant succeeds and asks for refund, his claim will be barred; it will be thrown out on the ground that it has not been filed within six months from the date of payment of duty. We think that the entire edifice of this argument is erected upon an incomplete reading of Section 11B . 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. It was then submitted that Rule 233B which prescribes the procedure to be followed in cases where duty is paid under protest requires the assessee to state the grounds for payment of duty under protest and that it may well happen that the authority to whom the letter of protest is submitted may refuse to record it, if he is not satisfied with the grounds of protest. In our opinion, the said apprehension is not well-founded. Sub-rules (1), (2) and (3) of Rule 233B read as follows:

"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 the 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."

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 to protest when delivered to him - and that a acknowledgement shall be the proof that the duty has been paid under protest. A reading of the rule shows that the procedure proscribed 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."

8. From the aforesaid, it is apparently clear that the deposit made by the appellant was made under protest.

9. Once the deposit of duty was made under protest, the second proviso of Section 11-B of the Act comes into operation, namely, that the period of limitation of six months would not apply to a claim of refund. Consequently, the

finding of all the authorities that the application of the appellant was barred by limitation, is patently erroneous. The period of six months as envisaged under Section 11-B(1) of the Act, is applicable when duty has not been paid under protest and an application for refund has been filed within six months, but where a duty has been paid under protest, then the period of limitation does not arise. The application for refund can be filed at any time even after the period of six months.

10. In the instant case, the judgment of the Tribunal was delivered on 22.01.1999. The application was filed on 31.08.1999 within a period of seven months which, in our opinion, is a reasonable period. The application for refund does not become barred by time.

11. Assuming that the appellant is required to file an application within six months from the date of order of the Tribunal, the provision of Section 12 of the Limitation Act, would automatically come into play, namely, the period spent in obtaining the order has to be excluded. If the provision of Section 12(2) of the Limitation Act is applied, the appellant's application for claiming the refund would be within a period of limitation of six months, inasmuch as, the judgment of the Tribunal dated 22.01.1999 was received by the appellant on 23.03.1999. The period of limitation will start accordingly from that date.

12. We are, therefore, of the opinion that application of the appellant for claiming refund was filed within a reasonable time and, in any case, within a period of limitation. The learned counsel for the appellant has placed reliance upon a decision of the Delhi High Court in the case of Qualimax Electronics Pvt. Ltd. Vs. Union of India (UOI) and Others, , which, in our opinion, is clearly applicable.

13. We further find that the Tribunal committed a manifest error in non-suiting the appellant's claim on the sole ground that the appellant was only a buyer and, therefore, was not entitled to claim a refund of the duty. This finding is patently perverse. Section 11-B of the Act provides that any person can make an application for refund of duty. Further, in the instant case, the appellant is not only a purchaser but is also a manufacturer of fertilizer and was entitled to purchase Naphtha under the notification issued under the Central Excise Act, 1944 at a concessional rate of duty. Since, the appellant was denied the requisite forms/certificate and deposited the duty under protest, he was entitled to claim a refund.

14. In the light of the aforesaid, the appeal is allowed. The questions of law, as referred above, are answered in favour of the appellant and against the Department. The orders of the Tribunal and all the other authorities denying the claim of refund are set aside. We hold that the appellant is entitled for refund of excise duty and interest.