

**(2001) 03 BOM CK 0021**

**In the Bombay High Court**

**Case No : Writ Petition No. 1335 of 1988**

Lipi Boilers Private Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

**Date of Decision : 20-03-2001**

**Acts Referred:**

Central Excise Rules, 1944 — Rule 173B, 233B, 233B(1), 233B(2), 233B(4)  
Central Excises and Salt Act, 1944 — Section 11, 11B, 11B(1), 11B(5), 12A  
Constitution of India, 1950 — Article 226

**Citation : (2001) 133 ELT 26**

**Hon'ble Judges : R.G. Deshpande, J;D.S. Zoting, J**

**Bench : Division Bench**

**Advocate : A.M. Kanade and Naikwade, for the Appellant; P.G. Godhamgaonkar, Id. Standing Counsel, for the Respondent**

**Final Decision : Dismissed**

## **Judgement**

R.G. Deshpande, J.—Petitioner, a Private Limited Company, is doing the business through its factory at E-5, M.I.D.C. Industrial Area, Chikalthana, Aurangabad. It deals in boilers and boiler parts falling under Chapter sub-headings 8402 and 8404 of the Central Excise Tariff Act, 1985 (for short the Act of 1985). Needless to mention, the petitioner holds a valid licence as required under the Central Excise Act, 1944 (hereinafter referred to as the said Act for the purposes of brevity).

2. By Notification bearing No. 120/81-C.E., dated 15-5-1981, which was amended by Notification No. 209/82-C.E., dated 9-8-1982 and a subsequent Notification No. 80/86-CE., dated 10-2-1986, necessary exemption from the whole of the excise duty leviable on the goods as specified in the table to the said notifications was granted. Prior to the abovesaid notifications, no doubt, the items included in the notification happened to be covered in tariff Item No. 68 (NES) of the First Schedule to the Act of 1985. These items subsequently have been included under Chapter Nos. 73, 84 and 85 in the Schedule of the Act of

1985.

3. Petitioner is contending that the petitioner is entitled for complete exemption in respect of the items included in the schedule, particularly with which the petitioner is concerned. According to the petitioner, it manufactures, non-conventional energy systems, which stand exempted from the payment of whole of the excise duty in pursuance of the notifications referred to above. Worth it is to note at this stage, the items manufactured by the petitioner appear at Sr. No. XIV, as is clear from Annexure "A" page 24 of the petition.

4. It is the case of the petitioner that on the basis of the Notification dated 15-5-1981, bearing No. 120/81-C.E., the petitioner was entitled to claim exemption from payment of excise duty on the rice husk fired boilers and rice husk fired boiler parts. The classification list, under Rule 173B of the Rules framed under the said Act, in respect of the petitioner, stood necessarily approved by the Department granting exemption to the petitioner and to be precise for the period from 1-1-1984 to 30-4-1984 and also from 1-5-1984 to 31-5-1984. It is the contention of the petitioner that during the abovesaid period, the rice husk fired boiler parts amounting to Rs. 6,32,800/- and Rs. 2,34,000/- respectively were cleared without payment of central excise duty. However, according to the petitioner, subsequently the exemption which was granted, came to be withdrawn and, therefore, the petitioner was charged with the duty as per the change in view by the Department. The demands which were made were confirmed by the Department as regards the excise duty on the clearances of the material excisable effected during the period from 1-1-1984 to 31-5-1984 vide adjudication orders bearing Nos. V/68(4)/16/TB/84 and V/68(4)/37/ TB/84, dated 31st January, 1985. It is the contention of the petitioner that the petitioner paid the duty under protest and approached the Appellate Authority u/s 35A of the said Act seeking refund of the duty paid, which according to the petitioner was paid under protest. Petitioner contended that since the duty was paid under protest, the question of any limitation provided u/s 11B of the said Act did arise.

5. Though in the petition, the reference is made regarding pendency of the appeal, however, no details or particulars about the same are referred to or mentioned in the petition by the petitioner. This court is, therefore, deprived of the information as to what is the stage of that appeal, whether it is decided or not. Unfortunately, the learned Counsel for the petitioner also is not in a position to make positive statement in this respect. The same is the case as regards the respondent - Department.

6. It is the case of the petitioner that the Respondent No. 2 - Collector of Central Excise and Customs issued Trade Notice bearing No. 115/1986 clarifying the position that the rice husk fired boilers could be considered as agricultural and municipal waste conversion devices producing energy for the purposes of exemption under Notification No. 120/81-C.E., dated 15-5-1981. However, this exemption was so long as they were specially designed for operating a rice husk

fired boilers, though it may be capable of using as other conventional fuels.

7. The petitioner contended that, according to the petitioner, the petitioner cleared one rice husk fired boiler to M/s. Amrit Banaspati Company Limited, Ghaziabad (Uttar Pradesh) against GP No. 127, dated 3-3-1986; GP No. 138, dated 29-3-1986; GP No. 04, dated 13-4-1986; GP No. 09, dated 23-4-1986; GP No. 10, dated 24-4-1986; GP No. 15, dated 3-5-1986; GP No. 16, dated 4-5-1986; GP Nos. 18 and 19, dated 12-5-1986; GP No. 23, dated 17-5-1986; GP No. 24, dated 17-5-1986; GP No. 41, dated 21-6-1986 and GP Nos. 65 and 66, dated 12-8-1986. In short, on the basis of the abovesaid GPs, the material has been cleared on payment of excise duty in respect of which the petitioner claimed exemption and refund of the same contending that the payment so made was under protest.

8. Relying on the Notification No. 120/81-C.E., dated 15-5-1981, the petitioner claimed that since the rice husk fired boiler was considered as agricultural and municipal waste conversion devices producing energy, the petitioner was entitled for the exemption claimed and for refund of the excise duty paid. A demand in that respect is made by the petitioner on 24th January, 1987. In fact, for the first time, such a valid claim was made by the petitioner, as prior to that, a claim was made by letter dated 9-12-1986, however, the same was made in a defective manner and, therefore, the Department did not take cognizance thereof and directed the petitioner to make appropriate claim strictly in accordance with. It is, therefore, clear that the first valid claim made could be said to be dated 24th January, 1987.

9. Shri A.M. Kanade, learned Counsel with Shri Naikwade, learned Counsel for the petitioner contended that the excise duty, which is paid on the basis of the cleared gate passes, to which a reference is made above, in fact, has been wrongly collected or unauthorisedly recovered by the Department from the petitioner, and the petitioner, therefore, is entitled for the refund of the same without any condition or without any formality therein. It is the contention of the learned Counsel for the petitioner that the request made by the petitioner is not granted by the respondent authority on the ground that for the refund as per gate passes dated 21-6-1986 and two gate passes dated 12-8-1986, the petitioner was not entitled for refund, as the claim of the petitioner was barred by limitation as provided u/s 11B of the said Act. The learned Counsel for the petitioner contended that since the payment was made under protest, the question of limitation of six months as provided u/s 11B of the said Act did not arise. The learned Counsel further contended that even otherwise when the recovery made or tax recovered is illegal in every respect and unauthorised, there is no question of application of any limitation, muchless of six months in the present case. The learned Counsel for the petitioner also contended that since it is unauthorised and illegal recovery of tax or excise duty, the question of challenge to the same by way of appeal as an alternative remedy also did not arise, as it could be said to be the subject matter of challenge through the writ

petition only.

10. As against the argument of the learned Counsel for the petitioner, Shri P.G. Godhamgaonkar, learned Standing Counsel for the respondent - Department, vehemently contended that in accordance with the provisions of Section 35 of the said Act, an alternate remedy by way of appeal as a statutory provision has to be exhausted in respect of every claim which is made by the petitioner in this matter and failure in respect thereof on the part of the petitioner definitely is fatal to the maintainability of the present petition. According to Shri Godhamgaonkar, learned Standing Counsel, the present petition should not have been entertained and cannot be entertained. He, further, contended that even though the petition is admitted long back, the same can be dismissed at this stage on this sole ground. In support of his contention, Shri Godhamgaonkar, learned Standing Counsel relied upon a decision reported in Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, . Shri Godhamgaonkar, learned Standing Counsel further contended that there is no material placed on the record by the petitioner to demonstrate that the excise duty which is said to be paid by the petitioner was paid under protest. To weigh and appreciate the argument of Shri Godhamgaonkar, learned Standing Counsel, we had pointed question to the learned Counsel for petitioner to show any material on the record, so as to convince the Court in respect of payment having been made under protest. However, the learned Counsel for the petitioner was unable to point out a single document on the basis of which it could be traced that the payment of excise duty as made by the petitioner in respect of abovesaid items was under protest. To find out whether the petitioner in the instant matter could be said to be entitled for exemption from operation of the provisions of Section 11B of the said Act, it would be appropriate for us to refer to certain provisions of the said Act and the Rules framed thereunder. Section 11 of the said Act deals with the recovery of the sums due to the Government. The relevant provision is Section 11B for the purposes of the present petition. It deals with the subject of claim for refund of duty. Sub-section (1) of Section 11B reads as under:

"11B. Claim for refund of duty. - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of six months 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 in relation to which such refund is claimed was collected from or paid by him and the incidence of 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 subsection as amended by the said Act and the same shall be dealt with in accordance with

the provisions of Sub-section (2) substituted by the Act:

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

From the reading of this Section 11B, it is absolutely clear that, the person claiming refund of excise duty, has to make an application for refund to the authority concerned referred to in that Section. It is also clear from the said provision that such an application has to be made before the expiry of six months from the relevant date in such a form and manner as may be prescribed and such an application has to be accompanied by such documentary or other evidence including those documents as are referred to in Section 12A of the said Act. Second proviso to the said Section 11B makes it clear that the limitation of six months given in Section 11B(1) shall not be applicable where any duty has been paid under protest.

From the reading of the abovesaid Section, it is clear that to get relieved from the application of the limitation of six months, the petitioner has to show that the tax or excise duty was paid under protest and application has to be strictly made in pursuance of the provisions of Section 11B of the Act and necessary documents of having paid the excise duty are to be attached with the form. To find out as to whether payment is made under protest or not, it would be appropriate for us to have the help from Rule 233B of the Rules framed under the said Act. Sub-rule (1) of Rule 233B specifically directs that an assessee who desires to pay the duty under protest, has to deliver to the proper officer a letter to this effect and has to give grounds for payment of duty under protest. Sub-rule (2) of Rule 233B directs that on receipt of such letter under protest, the officer has to acknowledge the receipt to that effect and such an acknowledgement, subject to the provisions of sub-rule (4) of Rule 233B shall be the proof that the assessee paid the duty under protest from the day on which the letter of protest was delivered to the proper officer.

Another mode to demonstrate the payment made under protest is enumerated in sub-rule (4) of Rule 233B. Sub-rule (4) of Rule 233B reads as under:

"Rule233B....

(1)...

(2)...

(3)...

(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]

..."

From this Rule, it is clear that either the acknowledgement referred to in Sub-

Rule (1) or an endorsement on the gate-pass indicating duty paid under protest, are the two modes, by which the petitioner can demonstrate that he paid the duty under protest.

In the present matter, unfortunately the petitioner failed to point out either the endorsement from the competent officer acknowledging the duty having been paid under protest or gate-pass indicating remark, "duty paid under protest". Therefore, we are not in a position to accept the contention of the petitioner that he is exempted from the application of provision of Section 11B of the said Act so as to get his claim saved from the application of six months limitation. The contention of the petitioner is that the very recovery of the tax is illegal in view of the Trade notice referred to in the earlier paragraph of the judgment. We do not find that it is the argument which could be accepted for any better purposes. Fact remains that the petitioner paid the excise duty, the Department accepted the same in the very same character as excise duty, at the time of payment itself both the parties were under correct impression of accepting and paying the duty and hence the question of any authority or no authority in the respondent - Department to recover the same did not arise. Exemption to be made applicable and refund to be made has to be strictly in accordance with the provisions of Section 11B of the said Act. We find that the claim made by the petitioner is partly accepted by the Department and has also ordered the refund of Rs. 32,940/-, however, the rest of the claim which was made i.e. for an amount of Rs. 2,64,327/- has been refused to be refunded by the Department. This action of the Department is based on the contention that the matter which was being adjudicated and as the adjudication order dated 4-12-1987 is passed, in File No. V. 68(18)/TD/87 taking into consideration that the claim of Rs. 32,940/- was made within six months of the payment thereof. However, rest of the claim was pertaining to the duty paid under gate-passes beyond six months from the date of filing refund claimed in question.

12. Since there is no question of any illegal recovery and since it is further clear that the petitioner had paid the excise duty under bonafide belief that he was liable to pay the same and since he further did not pay the same under protest, there is hardly any scope for the petitioner to get himself relieved from the clutches of Section 11B of the said Act. In our opinion, therefore, the petitioner cannot be said to be entitled to the relief of refund of the complete amount of excise duty paid by him, but he is definitely entitled for refund only to the extent which falls within the period of six months as contemplated u/s 11B of the said Act. We, therefore, do not find any illegality in the decision taken by the adjudicating authority in not refunding the amount of Rs. 2,64,327/-. From this position, it is also clear that even, according to the Department, if the petitioner would have claimed the refund well within time, the petitioner would have been entitled for the same. The claim which is made within time i.e. of Rs. 32,940/- definitely has to be ordered to be refunded to the petitioner.

13. The next point, which needs consideration in the present petition, is as

regards availability of the alternate remedy to the petitioner in accordance with Section 35 of the said Act. The petitioner is aggrieved by the order dated 4-12-1987, passed by the Assistant Collector, Central Excise and Customs, Aurangabad Division, Aurangabad, in File No. V. 68(18)/88/TD/ 87/9655. According to Shri Godhamgaonkar, learned Standing Counsel, this was an appealable order u/s 35 of the said Act. The learned Counsel for the petitioner also does not dispute the position. Not only this, but the very introduction of the order makes it clear that it is appealable order and as to how the appeal is to be preferred and before whom. It is frankly admitted by the learned Counsel for the petitioner that no appeal is preferred against the abovesaid order. When a statutory appeal is provided for and if that remedy is not exhausted, we will have to find out, will it be appropriate at this stage to dismiss the petition on this sole ground. Shri Godhamgaonkar, learned Standing Counsel appearing on behalf of the respondent-Department has invited our attention to Garware Plastics and Polyester Ltd. and another Vs. Union of India and others, . Relying on this judgment, Shri Godhamgaonkar, learned Standing Counsel has argued that even at this stage the petition can be dismissed on this sole ground. No doubt, in ordinary course once the petition is entertained, it would not be appropriate to reject the petition on the ground that the petitioner had an alternate remedy open 12 years back itself. However, so far as the facts of the present case are concerned, we find that the petitioner was made aware of his right of appeal before the appropriate authority, as is clear from Exh. M at page 69 of the petition. However, in spite of having been made aware of his right and availability of an alternate remedy, the petitioner did not find it appropriate to approach the appellate authority and filed the petition that too after the period of appeal was over and to circumvent this, validity of Sub-section (5) of Section 11B of the said Act has been challenged in this petition, which, however, is not pressed during the course of the hearing of the present petition. Keeping in view these facts, we will have to find out, will it be appropriate to dismiss this petition on the ground that the petitioner had an alternate remedy available then in the year 1988 itself. We see that it is not the case of the petitioner that he paid the excise duty under some mistaken notion of law and, therefore, he filed the present petition for refund of the tax or the excise duty he paid. Having lost the limitation, to circumvent the same, the present petition is filed. It is also not the case of the petitioner that under the mistake of law the Department recovered the excise duty, so as to enable the petitioner to approach this Court under Article 226 of the Constitution of India. If the petitioner would have been slightly diligent enough, he could have conveniently avoided to make the payment of excise duty which he cleared through gate-passes, which were in between the period from 3-3-1986 to 17-5-1986. In our view also, therefore, the claim between the abovesaid period for refund of the excise duty paid by the petitioner, is definitely hit by the limitation of six months given u/s 11B of the said Act, however, the claim to which he was otherwise legally entitled to as permissible under that provision of six months, the same is no doubt refunded to him.

14. After having gone through the order passed by the Assistant Collector, Central Excise and Customs, Aurangabad Division, Aurangabad, we find that a well reasoned order has been passed and the petitioner himself was liable to be blamed for having lost the opportunity of getting the refund of excise duty paid by him. We do not find any wrong in the order passed by the authority below. The order deserves to be maintained and even on the ground or alternate remedy, we feel that it is an appropriate case wherein the petition also can be dismissed on that ground.

15. In the result, petition stands dismissed. Rule is discharged. However, in the circumstances of the case, there shall be no order as to costs.