

(1990) 01 AHC CK 0055
In the Allahabad High Court
Case No : Misc. Writ No. 1227 of 1988

Paharpur Cooling Tower Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 01-01-1990

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B
Constitution of India, 1950 — Article 226, 265

Citation : (1991) ECR 341 : (1990) 47 ELT 235

Hon'ble Judges : Om Prakash, J;A.N. Verma, J

Bench : Division Bench

Advocate : S.P. Gupta, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

A.N. Verma, J.—By means of this petition the petitioner has prayed for a writ of mandamus directing the respondents to refund the excise duty said to have been paid by them under a mistake of law in respect of what has been described as scantlings.

2. Shortly stated, the relevant facts are that the petitioner carries on the business of designing and erecting cooling towers as per requirements of its customers. In erecting these cooling towers the petitioner obtains logs of timber, which are converted by them into scantlings. Treating this as an item of excisable commodity, the petitioner paid excise duty thereon during the period 1-3-1975 to 17-11-1980. The petitioner, however, discovered through a judgment of the Supreme Court dated 9-5-1980 in the case of Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, and the principle underlying that decision that scantlings were not liable to excise duty. The petitioner accordingly applied to the respondents by means of the application filed in February, 1981, for the refund of the excise duty paid by it during the aforesaid period on scantlings. The respondents, however, did not accept the claim of the petitioner and held that scantlings were liable to excise duty. The

applications for refund were accordingly dismissed. The applications were also dismissed on the ground that the same were barred by limitation applying the limitation prescribed u/s 11B of the Central Excise Act.

3. Aggrieved by the order of the Assistant Collector the petitioner filed an appeal which was also dismissed. A further appeal filed by the petitioner before the Customs, Excise and Gold Control Appellate Tribunal was disposed of by the Tribunal by the judgment dated 1-6-1988. The Tribunal upheld the claim of the petitioner and held that excise duty was not payable on scantling. While remanding the case the Tribunal asked the Assistant Collector to examine the question whether payment of excise duty was made under protest with a view to ascertain whether the petitioners' claim was not barred by limitation prescribed u/s 11B of the Central Excises and Salt Act, 1944.

4. Having heard Sri S.P. Gupta, learned counsel for the petitioner, and the learned Standing Counsel for the Union of India, we are of the opinion that where it is found that payment of tax was made under a mistake of law, the right to refund would not depend on whether the payment was made under protest or otherwise. We are further of the opinion that to such claims the bar of Section 11B does not apply. We are fully fortified by the decisions of this court in which it has been consistently ruled relying on Supreme Court decisions that where payments are made under a mistake of law, the bar of limitation created u/s 11B of the Central Excises and Salt Act, 1944 would not apply. It has been further ruled that to such claims of refund the three years rule would be attracted under the general law as in the case of suits, the starting point being the date of knowledge of the fact that the payments were made under a mistake of law. See *Guru Charan Industrial Works Vs. Union of India (UOI) and Others*, and *Raman Electricals, Mathura v. Union of India* and Ors 1988 (33) E.L.T. 275

5. In the present case the allegation it is that it is through the decision of the Supreme Court in the case of *Dy. Commissioner of Sales Tax v. Pio Food Packers* (supra). Rendered in May 1980 that the petitioner realized that it had paid the excise duty under a mistake of law. The petitioner's application for refund was filed promptly thereafter in February 1981. If we were to apply three years rule, the application for refund would be within time. In any case, the petitioner's claim that the excise duty was not payable on scantlings was upheld by the aforesaid Tribunal only on 1-6-1988. It was held that scantlings were not liable to excise duty. Even if, therefore, the petitioner's claim was barred by limitation u/s 11B, the jurisdiction of this Court to grant the relief of refund under Article 226 of the Constitution would still be available in view of the decision of this Court in the case of *Raman Electricals* (supra) in which it was held that even if a claim for refund of duty paid under a mistake of law is barred by limitation statutorily prescribed, the power of this Court under Article 226 of the Constitution would still be available provided the petition is filed within 3 years of the date of the knowledge. Article 265 of the Constitution was pressed in aid by the Bench.

6. Thus in either view, the petitioner was entitled to the refund of the amount of

excise duty paid by it on scantlings between the period 1-3-1975 to 17-11-1980 irrespective of whether or not the payment was made under protest.

7. In the result, the petition succeeds and is allowed. The Assistant Collector, Central Excise Division II, Ghaziabad, is directed to refund the excise duty paid by the petitioner on scantlings during the period 1-3-75 to 17-11-80 within two months from the date on which the certified copy of the judgment is submitted before him by the petitioner. There will, however, be no order as to costs.

8. A copy of this judgment will be given to the parties on payment of usual charges within a week.