
(1991) 07 BOM CK 0089
In the Bombay High Court
Case No : Writ Petition No. 2324 of 1981

Rotogravurs

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 29-07-1991

Acts Referred:

Central Excise Rules, 1944 — Rule 233B
Central Excises and Salt Act, 1944 — Section 11B, 11B(3)

Citation : (1992) ECR 173 : (1992) 57 ELT 407

Hon'ble Judges : M.L. Pendse, J;A.V. Savant, J

Bench : Division Bench

Advocate : Shri Vivek Sharma, for the Appellant; Shri R.V. Desai, for the Respondent

Judgement

1. The petitioner is a manufacturing unit inter alia carrying out job work of re-engraving on second-hand rollers. The petitioner filed classification list dated October 5, 1985 for classification of the product as non-excisable on the ground that the process does not amount to manufacture. The petitioners claimed that CEGAT had also decided in the case reported in 1985 (21) ELT 562 that the work undertaken by the petitioner does not amount to manufacture. The Assistant Collector of Central Excise by order dated January 21, 1986 accepted the claim of the petitioner.

2. The Superintendent of Central Excise by letter dated February 17, 1986 directed the petitioner to file advance classification list in view of the new Tariff Act becoming effective from March 1, 1986. The petitioner filed classification list on February 24, 1986 and pointed out earlier order dated January 21, 1986 passed by respondent No. 3 approving the product as non-excisable. The Superintendent of Central Excise directed clearance of the product as excisable under sub-heading No. 84.62 of the new tariff. The petitioner filed fresh classification list on April 2, 1986. The petitioner informed that the clearance would be under protest and the duty is paid by reserving contention that the

product is non-excisable. The contention of the petitioner was not accepted by the Assistant Collector by order dated December 29, 1989. The petitioner preferred appeal to the Appellate Collector of Central Excise and the appeal was allowed by order dated April 5, 1990. The result of the order of the appellate authority is that the product of the petitioner was held as non-excisable on the ground that the work undertaken does not amount to manufacture.

3. In pursuance of the order passed by the Assistant Collector earlier on January 21, 1986 and view of the order passed by the appellate authority holding that the work carried out by the petitioner does not amount to manufacture and consequently the petitioner is not liable to payment of excise duty, several claims for refund for period commencing from December 11, 1985 and ending with March 31, 1990 were filed before the Assistant Collector of Central Excise. The total claim was Rs. 5,59,301/- and the break-up is set out in the impugned order passed by the Assistant Collector. The Assistant Collector served six show cause notices upon the petitioner to explain why refund claims should not be rejected as time-barred and inadmissible. The petitioner filed replies pointing out that the refund claims have arisen as a result of the order passed by the Appellate Authority and consequently the limitation cannot be claimed u/s 11B(3) of the Central Excises and Salt Act. The petitioner also pointed out that it is not permissible for the Department to deny refund on the principle of unjust enrichment in view of catena of decisions of this Court.

4. The Assistant Collector by order dated June 27, 1991 rejected the six refund claims on the ground that the claims are barred by limitation. The Assistant Collector also held that the petitioner is not entitled to refund on the principle of unjust enrichment. The decision of the Assistant Collector is under challenge in this petition filed under Article 226 of the Constitution of India.

5. Shri Sharma, learned Counsel appearing on behalf of the petitioner, submitted that the Assistant Collector was in error in rejecting the refund claims and we find considerable merit in the submission of the learned counsel.

The Assistant Collector held that the claims were barred u/s 11B of the Act because the duty was not paid during pendency of the appeal under protest. The conclusion is clearly unsustainable. In the first instance the petitioner addressed letter dated February 24, 1986, copy of which was brought to our attention. In the said letter the petitioner had clearly mentioned that the right to claim excise duty, if paid under mistake of law or otherwise, is reserved. This letter was written by the petitioner at the time when the classification list was not approved. Shri Desai submitted that the letter nowhere specifically refers to the expression that the duty is paid under protest. We are unable to find any merit in the submission. It is not the phraseology of the expression but the contents of the letter and the intention of the party which is to be gathered. We have no hesitation in holding that the petitioner had conveyed to the Department that duty would be paid under protest.

Shri Desai then submitted that even assuming that the letter conveys to the Department that the duty would be paid under protest, still the petitioner cannot be permitted to avoid limitation prescribed u/s 11B of the Excise Act in view of failure to comply with the requirement to procedural Rule 233B of Central Excise Rules. Rule 233B sets out the procedure to be followed in cases where duty is paid under protest, and sub-rule (4) prescribes that an endorsement "duty paid under protest" shall be made on all copies of the gate passes, application for removal and form RT 12. We enquired from Shri Desai as to what is the material to suggest that requirements of sub-rule (4) were not complied with and Shri Desai had no answer. Shri Desai also submitted that proviso to sub-rule (7) was also not complied with. The proviso prescribes that in a case where the assessee files an appeal or revision against order of classification, then the duty shall be allowed to be deposited under protest. Shri Desai submits that duty was not deposited under protest. We are unable to find any merit in the submission. The rule is clearly procedural in nature and the occasion to obtain refund does not arise out of procedural provisions of the Rules. The substantive right to get refund arises in view of the order passed by the Appellate Collector and even assuming that the procedure prescribed under Rule 233B was not complied with, still that would not disentitle the tax payer from recovering back duty that was paid and recovered by the Department contravention of law.

6. There is one more circumstance which cannot be overlooked. It has been held by this Court that the limitation prescribed under Rule 11B will have no application when the refund is sought in pursuance of the order passed by the appellate or revisional authority. The claim for refund cannot be denied by reference to limitation when the order passed by the Assistant Collector is set aside by the appellate authority and refund is due in pursuance of that order. Reliance by Shri Sharma on the decision reported in Rubber Products Ltd. Vs. Union of India, , in this connection is very appropriate. In our judgment the impugned order passed by the Assistant Collector in these circumstances cannot be sustained.

7. Shri Desai made a faint attempt to urge that the relief of refund should be denied on the doctrine of unjust enrichment. The submission is devoid of any merit. Duty was paid under protest and the petitioner is entitled to refund in view of the order passed by the appellate authority. The effect of the order passed by the appellate authority cannot be denied by resort to doctrine of unjust enrichment. Apart from this consideration, Shri Desai did not file any affidavit to establish that the petitioner did pass the burden of duty to the customers. In these circumstances the doctrine of unjust enrichment, even if available, is not attracted.

8. Accordingly, petition succeeds and the impugned order is set aside and respondents are directed to grant refund claimed by six refund applications after verification within a period of four weeks from to-day. In default, the Department shall refund the amount with interest at the rate of 15% per annum from to-day

till the date of payment. The respondents shall pay the costs of the petitioner.