

(2013) 10 RAJ CK 0012

In the Rajasthan High Court

Case No : . Other Tax Reference No. 24 of 2004

Shree Shyam Filaments

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 18-10-2013

Acts Referred:

Citation : (2014) 303 ELT 195 : (2014) 28 GSTR 65

Hon'ble Judges : V.K. Mathur, J;Dinesh Maheshwari, J

Bench : Division Bench

Judgement

1. In compliance of the order dated 14-10-2003 passed by this Court in D.B. Central Excise Reference Application No. 16/2003 u/s 35H of the Central Excise Act, 1944 ("the Act"), the Customs, Excise & Service Tax Appellate Tribunal, New Delhi ("the Tribunal") has referred the following questions for decision of this Court alongwith the statement of case:- (1) Whether in the facts and circumstances of the present case, the CEGAT was right and justified in rejecting the petitioner's refund claim as time-barred.

(2) Whether in the facts and circumstances of the present case, the petitioner's letters dated 5-10-1995 and 5-12-1995 clearly amount to lodging protest as required in terms of Rule 233B of the Rules.

The questions aforesaid have arisen because of a claim made by the applicant-assessee on 25-6-1998, seeking refund of the differential duty amounting to Rs. 14,92,578/- paid by them in respect of the additions on account of transportation, insurance, handling and delivery charges to the assessable value of goods cleared. According to the assessee, the payment in question was under protest whereas, according to the revenue, there was no proper protest with compliance of the requirements of Rule 233B of the Central Excise Rules, 1944 ("the Rules"/the Rules of 1944")-

2. The relevant facts and background aspects of the matter are in a narrow compass and could be noticed in the following : The assessee M/s. Shree Shyam

Filament Ltd. had been manufacturing synthetic filament yarn falling under Chapter 54 of the First Schedule to the Central Excise Tariff Act. The case of the assessee had been that under intense pressure of the department, they had paid, during the period 6-12-1995 to 22-10-1997, the differential duty in respect of the additions to the assessable value of goods on account of transportation, insurance, handling and delivery charges for the clearances made during the period 1-3-1994 to 30-11-1996. The case of the assessee further had been that by way of the letters dated 5-10-1995 and 5-12-1995, they had lodged protest against inclusion of such charges in the assessable value of goods when the Assessing Officer proposed to make such additions; and during the pendency of those proceedings, the amount in question was paid after raising objections. Ultimately, the objections of the assessee were sustained. Thereafter, on 25-6-1998, the assessee lodged the claim, per Section 11B(2) of the Act, for refund of the amount paid towards additional value included in the assessable value of goods cleared.

3. The Deputy Commissioner Central Excise, under Order-in-Original No. 55-Refund/99, dated 18-11-1999, rejected the claim so made by the assessee for refund of the duty as being time-barred, while holding that the letters dated 5-10-1995 and 5-12-1995, as filed by the assessee with the Department, were not the letters of protests but were merely the letters of disagreement with the Superintendent on various issues; and that the procedure specified under Rule 233B of the Rules was not followed by the assessee. The Commissioner (Appeals) also, under Order-in-Appeal No. 443 (KDT) Central Excise/JPRI/233/2001, dated 5-7-2001, rejected the appeal filed by the assessee on the ground that there was no indication in both the said letters that the duty was being paid under protest.

4. In further appeal filed before the Tribunal, it was contended by the assessee that as per the second proviso to Section 11B of the Act, the limitation of six months for filing the refund claim shall not apply where any duty had been paid under protest; that under the letter dated 5-10-1995, they had recorded disagreement with the levy of differential duty on transportation, delivery charges; and as the Superintendent yet urged them to deposit the duty, they clearly mentioned in their letter dated 5-12-1995 that : "differential excise duty in case of Transportation/Delivery charges and Insurance Charges is not leviable"; and that these "are permissible deductions for the calculation of assessable values". It was also submitted that the Superintendent was requested "not to insist upon recovery on short levied excise duty amount charged in case of transportation/delivery and insurance charges"; and his continuous "insistence and pressure for recovery of the same would be unjustified and against the principle of natural justice."

5. It was urged by the assessee before the Tribunal that they had been contesting the legality of the levy from the very beginning and it was only under the threats that the duty was deposited by them and thus, it was nothing but

payment of duty under protest. The assessee relied upon the decision in the case of India Cements Ltd. Vs. Collector of Central Excise, , wherein the Hon''ble Supreme Court has held such a letter to be in the nature of protest. It was also the contention of the assessee that no form had been prescribed under Rule 233B of the Rules for lodging the protest; and that the procedure prescribed under Rule 233B was only directory and, therefore, the procedural lapse could not be a ground to deny the refund claim so long as there had been a protest lodged in the matter.

6. The revenue, on the other hand, submitted that as per Rule 233B(1) of the Rules, an assessee desirous to pay duty under protest was required to deliver to the proper officer a letter to this effect and to state the grounds for payment of duty under protest; and, according to the revenue, no such letter had been delivered by the assessee. It was contended that in both the letters dated 5-10-1995 and 5-12-1995, the assessee had only given the reasons as to why the differential duty could not be demanded; but after disputing the same, they paid the duty from 6-12-1995 voluntarily without delivering any letter of protest and continued to pay the duty subsequently.

7. The revenue also contended that the appellants had not challenged the levy of duty at any time either by way of filing the appeal or by way of making any representation. While relying upon the judgment of the Constitution Bench in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , wherein it has been held by the Apex Court that "any person paying the duty under protest has to follow the procedure prescribed by the Rules", the revenue submitted that the procedure specified under Rule 233B of the Rules having not been followed, the assessee was not entitled to claim that the duty had been paid under protest.

8. The Tribunal, by its Final Order No. 134/2002-A, dated 28-3-2002 [2002 (81) ECC 567], dismissed the appeal while agreeing with the submissions of the revenue that the letters dated 5-10-1995 and 5-12-1995 only conveyed the point of view of assessee and were not the letters of protest as they continued to make payment of duty for subsequent clearances also. The Tribunal also observed that even if the set of letters was regarded as that of protests, the appellant had not followed the procedure specified in Rule 233B; and at any rate, substantial compliance of requirement of Rule 233B was not made. The Tribunal also relied upon the observations of the Hon''ble Supreme Court in the case of Mafatlal Industries Ltd. to the effect that the procedure as prescribed under the Rules has been evolved with a view to keep the record of the payment of duty under protest; and that any person paying the duty under protest has to follow the procedure prescribed by the Rules. The Tribunal also referred to the deeming clause in Rule 233B that upon non-observance of the provisions of the Rules, it shall be deemed that the assessee has paid duty without protest.

9. Aggrieved by the order so passed by the Tribunal, the assessee submitted a reference application u/s 35H of the Act in this Court, being Reference

Application No. 16/2003. A Division Bench of this Court, while taking note of the background aspects and on the prima facie opinion that lodging of the letters dated 5-10-1995 and 5-12-1995 amounted to making payment under protest, which would take out the claim of refund from the arena of period of limitation, directed the Tribunal to state the case and refer the questions for decision of this Court. Accordingly, the questions, as noticed hereinbefore, have been referred by the Tribunal.

10. The learned counsel for the applicant-assessee has referred to the said letters dated 5-10-1995 and 5-12-1995 and submitted that these letters establish beyond doubt that the applicant-assessee had always been contesting the department's claim for differential duty in question and regularly agitated that no such duty was payable on the wrong addition of freight, insurance, handling and delivering charges to the assessable value of goods. According to the learned counsel, after regularly disputing the department's claim, if the assessee made the payment because of intense pressure of the department and under the threat of coercive proceedings, the payment cannot be said to have been made without protest. It is submitted that once the protest had been made before the department in unequivocal terms, the question of limitation u/s 11B of the Act does not arise. The learned counsel has particularly referred to the decision in *India Cements Ltd. (supra)* and submitted that the Hon'ble Supreme Court construed a similar nature letter as being that of protest. The learned counsel submitted that even after insertion of Rule 233B in the Rules, the position has not changed inasmuch as no form has been prescribed for lodging protest and, therefore, the decision in *India Cements Ltd.* holds and applies to the present case. The learned counsel has also referred to the decision of the Hon'ble Madras High Court in the case of *Commissioner of Central Excise Vs. ITC Ltd.*, to submit that Rule 233B cannot be construed in a narrow or hyper-technical manner and only a substantial compliance thereof would be sufficient to show that protest has indeed been lodged. The learned counsel emphasized that the authorities having wrongly non-suited the applicant-assessee only on the ground of limitation, the referred questions deserve to be answered in favour of the assessee and the matter deserves to be restored to the file of the authority concerned. The learned counsel has also referred to a decision of the Hon'ble Bombay High Court in the case of *Roche Products Ltd. Vs. Union of India*, .

11. Per contra, the learned counsel for the revenue has referred to the Constitution Bench decision of the Hon'ble Supreme Court in the case of *Mafatlal Industries Ltd. (supra)* and submitted that the requirement of law is to follow the procedure prescribed by the Rules; and only upon doing so that an assessee could be taken to have paid the duty under protest. According to the learned counsel, the letters in question, even if stating the alleged disagreement of the assessee, do not amount to lodging of protest while following the procedure prescribed by the Rules and when the assessee had paid the duty from 6-12-1995 to 22-10-1997 without a demur, it cannot be said that it had been the payment of duty under protest after following the procedure prescribed by the

Rules. The learned counsel has particularly referred to sub-rule (4) of Rule 233B and submitted that the gate-passes of clearance under protest have to carry such indication and such a procedure having not been followed, the assessee will be deemed to have paid the duty without protest as per sub-rule (8) of Rule 233B.

12. We have given anxious consideration to the rival submissions and have examined the record with reference to the law applicable. In order to appreciate the issues involved, appropriate it would be to take note of the provisions of law applicable to the case as also the principles expounded in the cited decisions.

13. Sub-section (1) of Section 11B of the Act, as then applicable, being directly relevant for the present purpose, could be noticed as under:--

11B. Claim for refund of duly. -

(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 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 Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act:

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

15. Rule 233B of the Rules of 1944 read as under:--

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 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 Form R.T. 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 to deposit the duty under protest, he may, within three months of the date of delivery of the letter of protest give a detailed representation to the Assistant Commissioner of Central Excise or Deputy Commissioner 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.

15. In *Mafatlal Industries*" case (supra), after taking note of the contentions in regard to this Rule 233B, the Constitution Bench laid down the law in the following:--

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 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.

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.

16. The case of India Cements Ltd. (supra) was, of course, decided before Mafatlal Industries" case and related to the then applicable Rule 11 of the Rules of 1944 but, had been a case where the claim of refund was similarly rejected on the ground of being barred by time. Therein, the duty was paid for the period 4-7-1974 to 1-3-1975. There had been a communication dated 11-6-1974 from the assessee raising objection that duty on packing charges of superfine cement was not leviable. The Hon"ble Court held that the letter raising all possible contentions against the levy in question was in the nature of protest. The relevant part of the observations and findings of the Hon"ble Apex Court in India Cements Ltd. could be noticed as under:--

7. We heard learned counsel for parties. It is not in dispute that the duty was paid for the period from July 4, 1974 to March 1, 1975. If it was paid under protest, the orders of the authorities cannot be sustained. It is, therefore, necessary to refer to the contents of the letter dated June 11, 1974. The letter raised many objections against the levy of packing charges. It was stated that the duty on packing charges on superfine cement was not leviable. The appellant finally said:

If the department feels that the duty is leviable on packing charges, we have no option, but to suggest the rates fixed by the Government of India from quarter to quarter, as packing charges.

.....

10. We gave our anxious considerations to the rival submissions. 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.

17. In ITC Ltd. (supra), the Hon"ble Madras High Court took note of the observations of the Hon"ble Supreme Court in Mafatlal Industries and said, -

.....The observation in the said paragraph "any person paying the duty under protest has to follow the procedure prescribed by the rule" does not mean that Rule 233B could be construed in a narrow, pedantic or hyper technical manner. In our opinion Rule 233B, as interpreted by the decisions of the Supreme Court referred to above, only mean that substantively there has to be a protest in writing. In the present case, the CEGAT has admitted the correspondences between the assesses and the revenue, and in our opinion that is the substantive

protest in writing.

18. Therein, the Hon''ble Court further observed that Rule 233B cannot control the full effect of the proviso to Section 11B(1) and said, -

14. In our opinion Rule 233B cannot control the full effect of the proviso to Section 11B(1). A rule made under the Act cannot limit a provision in the Act itself. It is well settled that a rule made under an Act will not be valid if it conflicts with or is in derogation to a section in the Act vide [Commissioner of Income Tax, Madras Vs. S. Chenniappa Mudaliar,]. Hence, a rule should not be construed in a manner that it conflicts with a Section of the Act.

19. In Indian Piston Limited Vs. The Collector of Central Excise, , the Hon''ble Madras High Court again noticed that Rule 233B did not prescribe any particular form of protest and observed as under:--

10. Mr. Ganguly next drew our attention to Rule 233B of the Central Excises Rules, 1944 which lays down the procedure to be followed when duty is paid under protest. The provisions of this rule, however, are of no relevance here because it has not been pointed out to us as to how the appellant has failed to observe this rule in any particular regard so that the provisions of clause 8 of the rule can come into effect. This rule does not prescribe any particular form of protest and hence it is not possible to say on the basis of this rule that the appellant-assessee in this case must be deemed to have paid the duty without protest.

20. It may, however, be observed that so far as the decision in Roche Products (supra) is concerned, the same does not apply to the fact situation of the present case and the questions involved herein for the reason that therein, the duty in question was paid during the period a revision petition was pending before the Government and it was held that once the Revisional Authority set aside the decision of the lower forum, the duty recovered in pursuance of the orders, which were reversed, could not be retained whether paid under protest or without protest.

21. Keeping in view the principles of law applicable, we may examine the referred questions i.e., as to whether on the facts and in the circumstances of the present case, the letters dated 5-10-1995 and 5-12-1995 amount to lodging of protest as required in terms of Rule 233B of the Rules; and whether the Tribunal was right in rejecting the assessee's refund claim as time-barred. Both the questions are, obviously, inter-related and the answer to question No. 1 depends on the answer to question No. 2.

22. Appropriate it would be to take note of the contents of the two letters, said to be of lodging of protest by the applicant-assessee. In the letter dated 5-10-1995, the assessee stated in relation to the duty in question as under:--

1. Under valuation short payment of duty on the amount charged in excess in the name of insurance charges - In this connection, please be informed that we are

preparing a complete detailed statement for insurance charges charged on all invoices raised by us during the period from April, 1994 to March, 1995-

2. Short levy of duty on amount charged in case of transportation/Delivery Charges : In this connection, your kind attention is invited to the judgment of the Hon"ble Supreme Court in case of Government of India and Others Vs. Madras Rubber Factory Ltd. and Others, which clearly allows the deduction of transportation cost and insurance from the normal price. Now the freight charged can be equalised and such charges are to be deducted from the normal price, and such deductions are common both at gate and at depot. Our price varies from Centre to Centre and it is fixed for one Centre. Hence, in view of the above referred judgment, the average freight is permissible for deduction from such wholesale price at factory gate and no excise duty is to be levied on such average freight as was also clarified in the case of Bombay Tyre International. The same fact has since been covered in the directions from Additional Solicitor General of India to Law Secretary dated 9-5-1995 covered under Circular No. 136/97/95-CX., dated 11-7-1995. According to us, the inference drawn by the Department is not correct that equalised freight can only be allowed as deduction in case we have uniform price throughout the country. In fact, the true reference to the judgment is that uniform price should be common at one Depot, Centre or place. Hence, our deduction of freight or equalised freight is justified. As desired, the detailed statement for transportation charges charged in various invoices since April, 1994 to March, 1995 is being prepared.

23. In the next letter dated 5-12-1995, the assessee stated as under:--

With reference to above, your kind attention is invited to our earlier submissions in this matter informing your goodself that differential Excise duty in case of Transportation/Delivery Charges and Insurance Charges is not leviable. These are indeed permissible deductions for the calculation of assessable values. There are several judgments including of Honourable Supreme Court which clearly allow the deductions of Transportations/Delivery Charges and Insurance charges from normal prices. However there is no nexus in recovery of transportation/delivery and insurance charges because excise is leviable on the manufacturing of goods and not on the post clearance expenses.

In this connection, we also invite your attention to our letter dated 5-10-1995 and would request you not to insist upon recovery on short levied excise duty amount charged in case of transportation/delivery and insurance charges. Your continues insistence and pressure for recovery of the same would be unjustified and against the principal of natural justice.

24. It is not in dispute that after the aforesaid two communications, the assessee did make payment of the differential duty in question in respect of addition to the assessable value of goods on account of transportation, insurance, handling and delivery charges for the clearances made during the period 1-3-1994 to 30-11-1996. The payment was made during the period 6-12-1995 to 22-10-1997.

25. The language and contents of the letter dated 5-10-1995, as reproduced hereinabove, leave nothing to doubt or guess that the assessee had pleaded, in unequivocal terms, with the department that duty was not payable on the additions made to the assessable value of goods towards transportation, insurance and handling/delivery charges. The contents of the letter dated 5-12-1995 further make it clear that despite the assessee having lodged the protest by the letter dated 5-10-1995, the department had been insisting for making such payment and hence the assessee put on record emphatic denial of the department's propositions; and the statement had been even to the extent that the insistence for such a payment would be unjust and against the principles of justice.

26. For their subject, contents and tenor, the aforesaid two letters dated 5-10-1995 and 5-12-1995 could only be regarded as the letters of protest. The contention urged on behalf of the department is that for being a protest as envisaged by Rule 233B, the assessee ought to have followed the procedure prescribed by the Rules and in the present case, such a procedure has not been followed. This contention, in our view, is of no avail for the department. In the first place, this contention remains rather a matter of form than of substance. Secondly, the requirements of Rule 233B cannot be construed in a narrow or hyper-technical manner and essentially, what is required is that substantively, there has to be a protest in writing. Thirdly, as shall be seen hereafter, all the requirements of Rule 233B cannot even be employed in the fact situation of the present case. Fourthly and in any case, the rule is procedural in nature and cannot control the substantive provision of Section 11B(1) of the Act.

27. Indisputably, no specific form of protest has been provided in the Rules. The simple and ordinary meaning of the expression "protest" is : "to express or record dissent or objection". The dissent, disagreement, and objection of the assessee had been clear, emphatic, unequivocal, and unambiguous in the communications aforesaid.

28. In the case of India Cements Ltd. (supra), the duty was paid from 4-7-1974 to 1-3-1975 but there was an objection stated in the assessee's letter dated 11-6-1974. The Hon'ble Supreme Court found that all the possible contentions, which could be raised against the levy of duty on the value of packing material were raised; and, on an ordinary reading, the letter made it clear that the assessee was not accepting the liability without protest. Such a letter was held to be that in the nature of protest and hence, the question of limitation was held not arising. We are unable to accept the submissions on behalf of the respondent that the principles from the decision in India Cements Ltd. would not be applicable to the present case because the operation of Rule 233B was not in question therein. On the question as to whether a similar nature communication from the assessee amounts to lodging of protest or not, the principles in India Cements Ltd. do apply and cannot be ignored. Viewed in the light of those principles, we have no hesitation in holding that the assessee's letters dated

5-10-1995 and 5-12-1995 had been of lodging of protest against the levy in question.

29. So far the requirement of following the procedure prescribed by the Rules is concerned, the same has to be construed from the practical stand point and cannot be employed in a hyper-technical manner.

30. The factors required to be taken into consideration in this case are that the payment was made during the period 6-12-1995 to 22-10-1997 whereas it related to the clearances made during the period 1-3-1994 to 30-11-1996. The assessee's letter dated 5-10-1995 was, in fact, a response to the communication dated 9-9-1995, as received from the Superintendent, Central Excise. It appears that the addition was sought to be insisted upon by the department at the later stage and hence came the protest from the assessee on 5-10-1995 which was followed by the communication dated 5-12-1995. When the department still insisted, the assessee made the payment. It is not in dispute that ultimately, the objections of the assessee were sustained.

31. In the totality of circumstances, it is very difficult to find as to how the requirements of sub-rule (4) of Rule 233B could have been fulfilled in respect of the clearances which had already been made before the department compelled the assessee to make payment of duty i.e., at least for the clearance made between 1-3-1994 to 5-12-1995. In the present case, in respect of these clearances, which had already been made before the department attempted to include the charges towards freight etc. in the assessable value of goods, sub-rule (4) can only be held inapplicable. As regards the other period, even if it be taken to be a case of lapse on the part of the assessee, looking to the substantive provision of Section 11B(1) of the Act and the ratio of the decisions above-referred, for such omission alone, substance of the matter is not lost altogether that the assessee was indeed protesting against the levy in question.

32. Several other aspects might be the matters for scrutiny while examining the claim for refund on its merits and hence, we do not propose to dilate on the same. Suffice it to observe for the present purpose that we are in respectful agreement with the observations of Hon"ble Madras High Court that Rule 233B cannot be construed in a narrow or hyper-technical manner; and a substantive compliance thereof would meet with the requirements, so far the question of lodging of protest is concerned. In the ultimate analysis, in the present case, for the purpose of second proviso to Section 11B(1), lodging of protest is required to be held complete by way of the aforesaid two communications dated 5-10-1995 and 5-12-1995. The question No. 2 is, therefore, answered in favour of the assessee.

33. As a necessary corollary, question No. 1 also deserves to be answered in favour of the assessee. A bare look at the second proviso to sub-section (1) of Section 11B makes it clear that the question of limitation does not arise in the case where the duty has been paid under protest. As observed and held

hereinabove, the assessee had indeed lodged the protest and made the payment of duty under protest. Hence, its claim for refund could not have been rejected only on the ground of limitation.

34. We would hasten to observe that consideration herein is limited to the questions referred and else, ultimately, whether the claim for refund is to be allowed, wholly or in part, or not, would be the matter for determination on the relevant questions and considerations by the authority concerned. Suffice it to say for the present purpose that the claim for refund could not have been rejected as being barred by limitation.

35. Accordingly, the referred questions are answered in favour of the assessee and it is held that the assessee did lodge the protest by the letter dated 5-10-1995 and 5-12-1995, which had been the substantial compliance of Rule 233B of the Rules; and the Tribunal was not justified in rejecting the assessee's refund claim as time-barred. As a necessary consequence, the refund claim of the assessee shall stand restored for consideration of the authority concerned on merits and in accordance with law.