

(1988) 04 AP CK 0015

In the Andhra Pradesh High Court

Case No : Case Referred No. 36 of 1984

U Foam Private Ltd.

APPELLANT

Vs

Collector of Central Excise

RESPONDENT

Date of Decision : 22-04-1988

Acts Referred:

Central Excise Rules, 1944 — Rule 11

Citation : (1989) 20 ECC 133 : (1988) 36 ELT 551 : (1989) 175 ITR 326

Hon'ble Judges : Y.V. Anjaneyulu, J;G. Ramanujulu Naidu, J

Bench : Division Bench

Advocate : Y.G. Rama Murthy, for the Appellant; K. Jagannadha Rao, for the Respondent

Judgement

Ramanujulu Naidu, J.—This reference is made by the Customs, Excise and Gold Control Appellate Tribunal, South Regional Bench, Madras, u/s 35G of the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Salt Act"). The reference is made at the instant of "U-Foam Private Limited, Hyderabad" (hereinafter referred to as "the assessee") and the respondent is the Collector of Central Excise, Hyderabad. The question referred for the consideration of this court is :

"In the facts and circumstances of the case, whether rule 11 of the Central Excises Rules, 1944, as it existed prior to the introduction of section 11B in the Central Excises and Salt Act, 1944, would apply, or the provision of section 11B of the Central Excises and Salt Act would apply or neither would apply ?"

2. We may state the relevant facts. The assessee imports raw materials, processes the same and manufacturers polyurethane foam which is classified under tariff item No. 15A(3) of the central excise tariff as it stood up to August 22, 1966. The assessee further processes the foam so obtained and manufacturers articles of polyurethane foam and such articles are liable to central excise duty under tariff item 15A(4).

3. The Central Government issued a Notification No. 69 of 1971, dated May 29, 1971. The notification is extracted below :

"GSR : In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts articles made of polyurethane foam, falling under sub-item (4) of item No. 15A of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), other than those specified in the schedule hereto annexed, from the whole of the duty of excise leviable thereon :

Provided that :

(a) such articles are produced out of polyurethane foam falling under sub-item (3) of the said item on which the duty of excise or the additional duty u/s 2A of the Indian Tariff Act, 1934 (32 of 1934), as the case may be, had already been paid; or

(b) such articles are produced out of scrap of polyurethane foam.

The Schedule

1. Sheets and sheeting
2. Mattresses and the like
3. Quilts and the like
4. Pillows
5. Cushions
6. Mats

(in any shape or size)

4. The effect of the abovesaid notification is that where articles are produced out of scrap of polyurethane foam, such articles, other than those articles mentioned in the schedule, would be exempt from the levy of central excise duty. It is not in dispute that the assessee manufacturers articles out of scrap of polyurethane foam and these articles include duitable articles in the schedule to the notification and also articles outside the schedule entitled to exemption. The assessee claimed that it was not liable to pay duty in respect of articles manufactured out of scrap of polyurethane foam, not being any one of the six scheduled items specified in Notification No. 69 of 1971.

5. While so, the exemption under Notification No. 69 of 1971 was further enlarged by Notification No. 108 of 1973, dated April 28, 1973. The notification is extracted below for ready reference :

"The Central Government hereby exempts all articles of polyurethane foam falling under sub-item (4) of item No. 15A of the First Schedule to the Central Exercises and Salt Act, 1944 (1 of 1944), manufactured from waste or scrap of

polyurethane foam, or from waste or scrap of articles of polyurethane foam, from the whole of the duty of excise leviable thereon."

6. From the above notification, it would be seen that it enlarged the scope of exemption of all articles manufactured from waste or scrap of polyurethane foam. While pursuing the claim for exemption, the assessee continued to pay the central excise duty on all articles manufactured out of such scrap falling under the old tariff item No. 15A(4).

7. It is urged that the assessee addressed numerous representations to the Department seeking benefit under the above notifications reiterating the claim that pursuant to the above notifications, no duty is payable and the departmental authorities were collecting the duty illegally in respect of articles manufactured out of scrap of polyurethane foam. It does appear that the assessee was in correspondence with the local officials of the Department and also the Central Board of Excise and Customs. Although some kind of clarifications were issued, they were either unhelpful or were not implemented the local officials. Disputes also arose as to whether the articles manufactured doubt of waste of polyurethane foam should be classified under tariff item No. 15A(3) or 15A(4). The assessee claimed that the articles have to be classified under tariff item No. 15A(4). The Assistant Collector of Central Excise, in his order dated January 2, 1975, held that the articles manufactured doubt of waste of polyurethane foam fall under tariff item No. 15A(3). Regarding the value for the purposes of assessment, the Assistant Collector held that it would be the value of the polyurethane foam blocks which are classified under item No. 15A(3) from which the goods in question were manufactured. The Assistant Collector declined to accept that the value of articles manufactured would be anything less than the value of the foam blocks themselves.

8. Against the aforesaid order, an appeal was filed before the Appellate Collector of Central Excise who, by his order dated September 5, 1975, affirmed the order of the Assistant Collector and rejected the appeal. Against that order, the assessee filed a revision application before the Ministry of Finance, Department of Revenue, Government of India. This revision petition was disposed of by Order No. 2122 of 1977 dated December 14, 1977. The order was passed by Sri C. P. R. Pillai, Additional Secretary, and Sri D. N. Lal, Joint Secretary. The order of the Government of India is extracted below for convenient reference :

"Government of Indian have considered the points raised by the petitioners in the revision application and those urged during the personal examination of the records of the case.

Government observed that it is unreasonable to conclude that the shreddings and scrap obtained from foam blocks while cutting the same to usable shapes, will continue to be of the same value as the original foam blocks.

The foam in which this product is cleared has to be taken into consideration for the purpose of determination of the assessable value of the same and not the

form of the original material from which it is produced.

Rule 56A of the Central Excise Rules, 1944, simply provided that waste arising from the process of manufacture where pro forma credit has been availed of in respect of materials or component parts used should be removed on payment of duty. It does not put any type of restriction or limitation regarding the assessment of such waste.

In view of the above, the Government of India set aside the order in appeal and allow the revision application."

9. Thereafter, the assessee filed a classification list in December 1978, before the Assistant Collector, Central Excise, claiming exemption under Notification No. 108 of 1973, dated April 28, 1973, in respect of 26 items of articles manufactured out of polyurethane foam waste. The Assistant Collector of Central Excise passed an order, dated March 16, 1979, determining the classification of each one of the items. It is not necessary to deal with the classification determined by the Assistant Collector of Central Excise in respect of each item. Suffice it to state that the Assistant Collector accepted the classification under tariff item No. 15A(4) in respect of some articles and rejected the classification in respect of some other articles.

10. Before submission of the classification lists in December 19, 1978, to the Assistant Collector of Central Excise, the assessee filed an application dated October 26, 1978, before the Assistant Collector of Central Excise for refund of the central excise duty paid on articles manufactured out of waste or scrap of polyurethane foam, pursuant to the two notifications above referred to. The assessee claimed refund of an aggregate duty of Rs. 53,16,683.74 paid during the period August 21, 1971, to August 31, 1978. This is classified as under :

From 21-8-1971 to 30-8-1975 : Rs. 21,28,358.78 From 1-9-1975 to 31-8-1977 :
Rs. 21,98,384.64 From 1-9-1977 to 28-2-1978 : Rs. 5,69,812.07 From 1-3-1978
to 31-8-1978 : Rs. 4,20,128.25 ----- Rs. 53,16,683.74

11. The assessee also stated in the application that the claim for refund is based on the notifications above referred to and the duty hence forward on the articles would be paid under protest. This application for refund reached the office of the Assistant Collector on November 3, 1978. While the claim for refund was receiving the attention of the Assistant Collector, the order dated March 16, 1979, to which a reference has been made above was passed by the Assistant Collector determining the classification of each one of the items specified in the classification list filed by the assessee in December, 1978. We have already pointed out that the Assistant Collector admitted some of the items in the classification list as falling under item No. 15A(4). After the order dated March 16, 1979, was passed, the Superintendent of Central Excise, Bala Nagar, addressed a communication to the petitioner bearing C.C. No. 428 of 1979, dated April 20, 1979, referring to the application for refund dated October 26,

1978. In this communication, the Superintendent of Central Excise advised the assessee to rework the claim for refund on the basis of the order bearing C. No. V/15-A-17/41/78-V-C dated March 16, 1979, of the Assistant Collector. Accordingly, the assessee reworked the claim for refund with reference to the items accepted by the Assistant Collector of Central Excise as falling under item No. 15A(4). The claim for refund was revised to Rs. 29,87,905.66 for the period from August 21, 1971 to February 28, 1978. The last period March 1, 1978, to August 31, 1978, was omitted obviously for the reason that the refund for this period was considered by the Assistant Collector in his order dated June 17, 1979. This revised claim was made in the assessee's dated September 21, 1979, addressed to the Assistant Collector.

12. The Assistant Collector passed an order on June 17, 1979. The order is extracted below :

"C No. V-15A-18-28/1979 Dated : 17-6-1979.

Sub : Central Excise-Refund claim of Messrs. U Foam for Rs. 4,14,081.09 - Regarding.

"Messrs. U Foam has preferred a refund claim of Rs. 3,13,081.09 for the excess payment of duty paid by them between 1-3-1978 to 31-8-1978 on the articles made out of waste and scrap of polyurethane foam which are exempt from duty. The party has been paying duty on the articles made out of waste or scrap of polyurethane foam till 31-8-1978. In this connection, the Assistant Collector, Hyderabad-I Division, also issued an order clarifying that the articles made out of waste or scrap of polyurethane foam are exempt from payment of duty. It is on the authority of the Assistant Collector's order that the party had put in the claim from 1-3-1978 to 31-8-1978 on 17-5-1979.

I have gone through the claim and found it is barred by limitation of six months under rule 11 of the Central Excise Rules, 1944. Therefore, I reject the claim."

13. Now, the order of the Assistant Collector of Central Excise refers to the assessee's claim for refund for the period March 1, 1978, to August 31, 1978, only. Although the application for refund was made for the period commencing from August 21, 1971 onwards, the order of the Assistant Collector does not refer to the claim for refund of duty paid during the period August 21, 1971, to February 28, 1978. That apart, the refund of duty claimed for the period March 1, 1978, to August 31, 1978, was shown at Rs. 3,13,081.09 whereas, according to the application of the assessee dated October 26, 1978, the claim for refund of duty was shown at Rs. 4,20,128.25. Apart from these shortcomings, it would be seen that the Assistant Collector rejected the claim for refund on the ground that it was barred by limitation under rule 11 of the Central Excise Rules, 1944.

14. The assessee filed an appeal against the aforesaid order of the Assistant Collector. The Appellate Collector of Customs disposed of the appeal by his order No. 478 of 1979, dated October 4, 1979. The following extracts from the order of

the Appellate Collector may be referred to :

"2. The Assistant Collector rejected the claim on the ground that it suffered from time-bar in the light of the provisions of rule 11 of the Central Excise Rules, 1944.

3. Prior to the rejection of the claim, the appellants were asked through the concerned Superintendent of Central Excise to resubmit the refund claims on the basis of the orders in C. No. V-15A-17-41-78V-C, dated March 16, 1979.

4. In this letter dated March 16, 1979, the then Assistant Collector of Hyderabad-I Division listed the articles which, according to him, merited to be exempted from duty in the light of the provisions of the Notification No. 108 of 1973, dated April 28, 1973. The appellants' representatives who attended the hearing informed that the articles listed in the Assistant Collector's letter were being exempted from duty after March 16, 1979.

5. It is not the claim of the appellants that they were not aware of the provisions of the Notification No. 108 of 1973 prior to October 26, 1978. Although they were aware of the provisions of this notification, they have not, prior to October 26, 1978, claimed exemption earlier and this has to be attributed to error, inadvertence, etc., on their part. Further, their failure to claim exemption from duty earlier has resulted in failure of the Department to ascertain which of the articles that had been cleared by them were manufactured from waste or scrap of polyurethane foam. In view of the foregoing, the provisions of rule 11 of the Central Excise Rules, 1944, would be attracted to their claim for refund. Since this claim had been received in the Assistant Collector's office on November 3, 1978, it would be within time in respect of the goods which had been cleared within a period of six months prior to November 3, 1978. In other words, the claim would be valid for the period from May 3, 1978, to November 3, 1978."

15. In view of the above findings, the Appellate Collector modified the Assistant Collector's order and directed that the assessee's claim for refund was valid and within time in respect of the goods cleared by them during the period May 3, 1978, to November 3, 1978. The Appellate Collector further directed that the claim for refund should be re-examined on merits. It is stated that after receiving the Appellate Collector's order, the Assistant Collector granted refund claimed by the assessee in respect of the goods cleared during the period May 3, 1978, to November 3, 1978. Thus, eventually it turned out that the assessee's claim for refund of duty paid in respect of the goods cleared during the period August 21, 1971, to May 2, 1978, was rejected.

16. Against the order of the Appellate Collector, the assessee carried the matter on further appeal to the Customs, Excise and Gold Control Appellate Tribunal. The Tribunal disposed of the appeal on May 25, 1983. The Tribunal upheld the order of the Appellate Collector and dismissed the appeal. On an application made by the assessee for reference u/s 35G of the Act, the Tribunal referred the question of law already mentioned in para 1 (at p. 328) for consideration of this court.

17. Confining first our attention to the question referred by the Tribunal, we may notice the provisions of rule 11 of the Central Excise Rules, 1944 :

"Rule 11. 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 Collector of Central Excise before the expiry of six months from the date of payment of duty :

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

Explanation. - Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be...

(4) Save as otherwise provided by or under these rules, no claim for refund of any duty shall be entertained."

18. The above rule was substituted by section 11B of the Act with effect from November 17, 1980. From the date when section 11B came into force, rule 11 was omitted. We may also state that rule 11, as it stood above, was operative from August 6, 1977, to November 16, 1980.

19. Section 11B inserted with effect from November 17, 1980, is more or less on the same lines as rule 11. The reason for omitting rule 11 and inserting section 11B in the Act appears to be to give statutory sanction to the provisions of subordinate legislation contained in rule 11. It is, therefore, enough if we notice that section 11B of the Act is substantially on terms analogous to the old rule 11.

20. We are unable to understand the relevant of the Tribunal referring the question whether rule 11 is applicable or section 11B is applicable, for we notice that the dispute before the Tribunal or, for that matter, before the lower authorities, was not in that regard. Indeed, it does not appear to be anybody's case that section 11B of the Act was applicable and no arguments were advanced on that basis either before the Tribunal or before the appellate authorities below. There was no discussion in the order of the Tribunal, as far as we could see, on the question of applicability of either old rule 11 or new section 11B of the Act. Obviously, section 11B can have no application in the present case, because it came into force on November 17, 1980, whereas the application for refund was made by the assessee in this case on October 26, 1978. On the date when the application for refund was made, old rule 11 was in existence and the question of considering whether section 11B of the Act would be applicable never arose. We may straightway point out that section 11B of the Act would be applicable never arose. We may straightway point out that section 11B of the Act can have no application in the circumstances of the case and, if anything, the only question is whether the time-limit specified under old rule 11 is applicable in the facts and circumstances of the assessee's case. The contention of the assessee has been

that the time-limit specified in old rule 11 is not applicable to a case where duty was illegally and unauthorisedly collected, without the sanction of law. The assessee's case has been that rule 11 can have application only in respect of the duty paid in accordance with the provisions of the Act which became refundable subsequently for any reason whatsoever. It was urged that the time-limit of six months specified in rule 11 did not apply to cases where the duty was unauthorisedly collected without the sanction of law. It was for that reason that the assessee's claim for refund, it is urged, must be considered without applying the time-limit under rule 11. We shall, therefore, address ourselves to this question, namely, whether the time-limit specified in old rule 11 is applicable in the facts and circumstances of the assessee's case and, if not, whether the refund application can be entertained on any other legal principle ?

21. We may refer to the decision of the Supreme Court in *D. Cawasji and Co. v. State of Mysore* [1978] ELT (154), wherein the scope of rule 11 of the Excise Rules was considered by the Supreme Court. Referring to the earlier judgment of the Supreme Court in *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, , the Supreme Court held that the period of limitation within which the application is to be made for securing refund of duty paid under a mistake of law is three years from the date when the mistake is known. It is stated that rule 11 of the Excise Rules will have no application in a case where money was paid under a mistake of law. The proposition that if recovery of duty is illegal and without jurisdiction, the claim for refund is not governed by statute is clearly well settled and was given effect to in a number of decisions (See the decision in *Shalimar Textile Mfg. Pvt. Limited Vs. Union of India and others*, , *Maharashtra Vegetable Products P. Ltd. v. Union of India* [1981] ELT 468 (Bom), *Wipro Products Ltd. v. Union of India* [1981] ELT 531 (Bom), *Associated Bearing Co. Ltd. v. Union of India* [1980] ELT 415 (Bom), *Gonterman Peipers (India) Limited Vs. Additional Secretary to the Government of India*, and *L.D. Textile Industries Ltd. and others Vs. Union of India and others*, .

22. We may refer to the latest decision of the Supreme Court in *Salonah Tea Co. Ltd. and Others Vs. Superintendent of Taxes, Nowgong and Others*, . The question that arose for consideration in this case was whether the refusal to refund the tax illegally collected under the Assam Taxation (on Goods Carried by Road and Inland Waterways) Act, 1954, was justified. Sabyasachi Mukharji J. observed :

"Normally speaking, in a society governed by rule of law, taxes should be paid by citizens as soon as they are due in accordance with law. Equally, as a corollary to the said statement of law, it follows that taxes collected without the authority of law, as in this case, from a citizen should be refunded because, no State has the right to receive or retain taxes or monies realised from citizens without the authority of law."

23. Section 23 of the Assam Taxation (on Goods Carried by Road and Inland Waterways) Act, 1954, provided that the Commissioner shall, in the prescribed

manner, refund to the purchaser or dealer any sum paid or realised in excess of the sum due from him under the Act. It was, therefore, claimed that the refund could be granted only within the period prescribed and not beyond. Repelling this contention, the Supreme Court pointed out that section 23 of the Assam Taxation Act applies only in a case where money is paid under the Act. If there is no provision for realisation of the money under the Act, the act of payment was ultra vires, the money had not been paid under the Act and in that view of the matter, section 23 would not apply. The same principle, in our opinion, holds good for rule 11 of the Central Excise Rules.

24. The time-limit specified in rule 11 for securing refund of duty paid applies only to a case where duty was paid in accordance with the provisions of the Act and that duty becomes refundable subsequently for one reason or the other. If the duty is paid under a mistake of law and without the sanction of law, it cannot be said that the duty was paid in accordance with law. Therefore, the time-limit specified in rule 11 for the grant of refund can have no application to a case where duty was paid by mistake by an assessee and collected illegally and unauthorisedly and without the sanction of law by the authorities.

25. After referring to the various cases bearing on the point, the Supreme Court held in *Salonah Tea Co. Ltd.*'s case, that the assessee was entitled to seek refund of the tax or duty paid under a mistake by preferring a claim within three years from the date when it came to the knowledge of the assessee or when the mistake was discovered. It was further observed by the Supreme Court in *Salonah Tea Co. Ltd.*'s case, that although it is true that in some case the period of three years is normally taken as a period beyond which the court should not grant relief, that is not an inflexible rule.

26. Learned standing counsel for the Central Government raised a two-fold plea against extending the assessee's claim beyond the period specified in rule 11. Firstly, it is stated that the question of applying the period of limitation under the general law may be relevant in a writ proceeding under article 226 of the Constitution, but not in a reference arising under the Act. Learned counsel claimed that the present question arose during the course of statutory remedies availed of by the assessee by filing an appeal to the Appellate Collector and to the Tribunal and in the present reference made by the Tribunal u/s 35G of the Act, it is not open to this court to go beyond the provisions of the Act and determine a period of limitation different from the one specified in rule 11. The second plea of learned standing counsel is that whether the duty is collected legally or illegally, the limitation provided by the Act and the rules must be applied. Learned standing counsel relied on the decision of the Supreme Court in *Burmah Construction Co. Vs. The State of Orissa and Others*, in support of this proposition. We shall examine the tenability of these pleas presently.

27. The assessee in this case claimed that the duty was illegally and unauthorisedly collected in respect of the goods manufactured from out of the scrap or waste of polyurethane foam. The assessee's case was that pursuant to

the notifications above referred to, the articles which fell under tariff item No. 15A(4) earned exemption. There was continuing correspondence between 1971 and 1978, when eventually an application was made for refund. The application for the refund was rejected by the Assistant Collector on the ground that it was barred by limitation. Obviously, the order passed by the Assistant Collector was appealable and the assessee carried the matter in appeal to the Appellate Collector as well as the Tribunal, availing of the statutory remedies. The contention urged was that the time-limit specified in rule 11 was not applicable and the application filed for refund in October, 1978, was perfectly valid, and the Assistant Collector of Central Excise was under an obligation to allow the refund pursuant to the application made. The question considered by the appellate authorities was whether the time-limit specified in rule 11 was or was not applicable in the facts and circumstances of the case. If the settled legal principle is that when money is paid by an assessee under a mistake of law, the limitation according to the general law is applicable, we do not see how that legal principle undergoes a change if the matter fell to be considered in the course of statutory remedies availed of by the assessee. We are unable to accept the proposition that legal principles could differ with reference to the nature of proceedings. Learned standing counsel for the Central Government does not deny that if a writ petition is filed invoking articles 226 of the Constitution, then, the period of limitation could be determined in accordance with the settled judicial pronouncements without reference to rule 11. We do not see how that principle undergoes a change because the matter happens to be considered and decided during the course of statutory remedies availed of by the assessee. It should be clearly borne in mind that the assessee every purported to make an application for refund under rule 11 of the Rules. Indeed, the assessee's case was that the application for refund was filed without reference to rule 11 and it was filed before the limitation had run out under the general law. No authority has been cited before us by learned standing counsel for the Central Government in respect of the plea that the legal principles to be applied vary with reference to the nature of the proceeding. In our opinion, whether the assessee was pursuing the remedy by filing a writ petition under article 226 or was availing of the statutory remedies available under the Act by way of appeal and reference to the High Court, the same legal principles would govern the matter. Just because the present proceeding is a reference proceeding, we are unable to state that the assessee is bound by rule 11 and rule 11 alone and the various judicial pronouncements which fairly settled the issue should be ignored, and because those pronouncements are made in exercise of the jurisdiction under article 226 of the Constitution. In our opinion, the period of limitation will have to be determined on the basis of settled principles, whether those principles are settled under statutory remedies availed of by the assessee or in the course of writ jurisdiction of the courts invoked. We are, therefore, unable to accept the first contention of learned standing counsel for the Central Government.

28. As regards the second contention of learned standing counsel that the same

period of limitation would operate whether duty is legally collected or illegally collected, we feel that the reliance placed on the Supreme Court's decision in *Burmah Construction Co. Vs. The State of Orissa and Others*, is misplaced. That case turned on entirely different facts. In that case before the Supreme Court, an application for refund was made u/s 14 of the Orissa Sales Tax Act. Once the application was made u/s 14 of that Act, there could be little scope for arguing that the provisions of section 14 fell to be ignored. What the Supreme Court pointed out was that when an application is made for refund of duty collected illegally under the Orissa Sales Tax Act, then the time-limit specified in section 14 of the Act read with the rules will have to be followed, because the application for refund itself was made u/s 14 reads with the rules. In the present case, the application for refund was not made under rule 11 of the Excise Rules. In our opinion, therefore, the principles emerging from the decision of the Supreme Court in *Burmah Construction Co. Vs. The State of Orissa and Others*, is not applicable to the present case. We may also point out that this principle has not been applied by the Supreme Court while dealing with a host of other cases, because of the essential difference in facts.

29. We are astonished at the plea of learned standing counsel that the application for refund in this case should have been made within the period of six months specified in rule 11 and because of the assessee's failure to do so, the refund application could not be entertained. We have referred to the correspondence between the assessee and the authorities starting from 1971 commencing immediately after Notification No. 69 of 1971 dated May 29, 1971 was issued. The assessee honestly felt that under the notification dated May 29, 1971, the goods manufactured out of scrap or waste of polyurethane foam are exempt from the levy of duty. After the exemption was enlarged by Notification No. 108 of 1973, dated April 28, 1973, the assessee thought that the claim for refund was more fortified. But then the Department turned the assessee out stating clearly that it is not entitled to claim refund under the two notifications. The officials expressed the view that the articles manufactured out of scrap or waste of polyurethane foam fell under tariff item No. 15A (3) itself and, therefore, duty is leviable. This controversy dragged on without any certainty about the real effect of the notifications until the Government of India disposed of the revision petition by its Order No. 2122 of 1977 dated December 14, 1977, to which we have made a reference in para 7 (p.330). In the revision order, the Government of India settled the controversy and upheld the assessee's claim that in respect of the articles manufactured out of scrap or waste of polyurethane foam, exemption is available under the two notifications above referred to. In our opinion, there is no substance in the assertion of the Department that the assessee should have made an application for refund within the period of six months specified in rule 11. It would be a meaningless ritual on the part of the assessee to file a refund application while the Department was denying the claim for refund and the matter was under consideration by the higher authorities. Even if the assessee had filed a formal application under rule 11, the fate of such

an application would be too well-known. The assessee cannot be accused that, with the awareness of the events, it should still have filed an application for refund within the period of six months specified in rule 11 only to invite an order of rejection from the Department. The assessee was engaged in the task of convincing the authorities that its claim for exemption was tenable and it could be stated that these matters came to a state of finality only on the Government of India passing the revision order dated December 14, 1977, and not a day before. Even after the Government of India had passed the revision orders, still the classification made by the assessee of the goods sold had to be effected. But then it could positively be said that after the Government of India passed its revision order dated December 14, 1977, there could be no mistake in the mind of the assessee that the duty in respect of the articles falling under tariff item No. 15A(4) is not payable pursuant to the two notifications above referred to. Having regard to these facts, we reject the second-contention urged by learned standing counsel.

30. Our discussion till now would show that, in the facts and circumstances of this case, it is neither rule 11 nor section 11B of the Act that is applicable. If that is so, the question to be asked is whether, on the facts and in the circumstances, the application for refund filed by the assessee on October 26, 1978, is within the period of limitation under the general law. Indeed, this is the real controversy between the parties and the Tribunal should have referred this question to this court for consideration. We, therefore, consider that the question referred for consideration by the Tribunal in this case should be reframed as under in order to bring out the real controversy between the parties :

"Whether, on the facts and in the circumstances of the case, the assessee's application for refund dated October 26, 1978, of duty paid in respect of the goods manufactured from out of the scrap or waste of polyurethane foam, is in accordance with law, and, if so, whether the assessee is entitled to the refund of the duty paid during the period August 21, 1971, to May 2, 1978 ?"

31. As we have already pointed out that, in the facts and circumstances, the period of limitation to be applied is three years from the date when the assessee discovered the mistake in the payment of duty or from the date when it came to the knowledge of the assessee that it is entitled to the refund. In *Cawasji and Co.'s case* [1978] ELT (154), the Supreme Court observed that the period of limitation prescribed for recovery of money paid under a mistake of law is three years from the date when the mistake is known, be it 100 years after the date of payment. On the facts stated above, the entire matter was in a fled state till the Government of India passed orders on the revision dated December 14, 1977. The mutually contradictory claims of the assessee and the Department were, for the first time, settled when the Government of India allowed the revision petition stating that the articles manufactured by the assessee out of scrap or waste of polyurethane foam, fell under tariff item No. 15A(4) and earned exemption from the payment of duty under the two notifications. It cannot be said that prior to

December 14, 1977, the assessee was consciously aware that it was paying the duty by mistake or that the Department was collecting the duty otherwise than under the Act. If anything, it could only be said that the assessee entertained a feeling that duty is not leviable. But then the authorities did not uphold the assessee's contention and, therefore, the assessee could have no reason to believe that it was paying the duty under a mistake. The position firmly came to the knowledge of the assessee only through the revision order of the Government of India dated December 14, 1977. If the crucial date, therefore, is December 14, 1977, then, it is open to the assessee to file an application for revision within three years from that date and the application filed on October 26, 1978, claiming refund of duty paid from August 21, 1971, is perfectly valid.

32. We may, for the sake of completeness, place on record that learned standing counsel did not argue that the revised working of the refund by the assessee of Rs. 29,87,905.66 was incorrect or needed verification. On the contrary, the argument proceeded on the basis that the quantification is correct. We may, however, point out that the sum of Rs. 29,87,905.66 worked out by the assessee relates to the period August 21, 1971, to February 28, 1978. Inasmuch as the assessee is entitled to claim refund till May 2, 1978, the amount of refund due for the period March 1, 1978, to May 2, 1978, has also to be quantified and the amount refunded to the assessee.

33. In the result, we answer the question as reframed by us in para 23 (p.340) in the affirmative, that is to say, the application filed by the assessee on October 26, 1978 claiming refund of duty paid in respect of the goods manufactured from out of scrap or waste of polyurethane foam, commencing from the period August 21, 1971, is within the period of limitation and, consequently, the assessee is entitled to the refund of the duty collected by the Department. The reference is answered accordingly in favour of the assessee and against the Revenue. There shall be no order as to costs.

34. An oral application for leave to appeal to the Supreme Court against the order just now pronounced by us is made by Shri Jagannadha Rao, senior standing counsel to the Union Government. We are, however, unable to certify that this is a fit case for grant of the certificate asked for. Leave asked for is accordingly refused.