SUPREME COURT OF INDIA

M.R.F. Limited

Vs.

Collector of Central Excise, Madras

(P.Venkatarama Reddi and S.H.Kapadia JJ.)

27.01.2004

C.A.No.9044 of 1996

JUDGMENT

S.H.Kapadia, J.

1. Being aggrieved by majority decision dated 5th January, 1996 of the Customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench at Madras in Appeal No. E/436/90/MAS, the original assessee has come by way of appeal under Section 35-L of *Central Excise and Salt Act, 1944*. By the impugned judgment and order, the assessee's claim for refund of Rs. 13,18,184.88 paid as differential duty on 6th April, 1987 in relation to period 1.3.1986 to 31.10.1986 came to be dismissed on the ground that it was paid voluntarily and suo moto and that the alleged protest was not in terms of Rule 233 B of *Central Excise Rule, 1944*.

2. Appellants manufacture "Vulcanising Solution" at their factory in Madras. On 3rd March, 1986, appellants filed the classification list under sub-heading 4006.90 carrying rate of duty at 15%. The said list was approved on 10.7.86. Appellants paid the duty at 15% accordingly from 1.3.86 onwards. However, on 28.10. 86 the Assistant Collector visited the appellant's factory and directed the appellants to give a revised classification list for the aforestated product under sub-heading 4005.00 carrying the rate of 40% advalorem and further directed the appellants to pay the differential duty for the past period i.e. 1.3.86 to 31.10.86. On 31.7.87, the Department issued a show cause notice alleging that said product was classifiable under sub-heading 4005 of Central Excise Tariff and further that exemption Notification No. 377/86 was not applicable. By the show cause notice issued by the Assistant Collector, the appellants were asked to show cause why duty for their past clearances should not be demanded at 40% advalorem under Section 11A of a Central Excise Act, 1944. On 6.4.87 the appellants paid the differential duty of Rs. 13,18,184.88 with the endorsement on the Challan stating that it was paid under protest. Thereafter on 10.4.87 the appellants filed a letter of protest with the Assistant Collector. In the said protest letter the appellants claimed that the product was classifiable under sub-heading 4005.00 read with exemption Notification No. 377/86 dated 29.7.86 at 15%. The show cause notice resulted in the order of adjudication by the Assistant Collector dated 10.1.88 wherein he confirmed the demand only

from 1.11.86 to 30.9.87 amounting to Rs. 25,61,791.72 as the appellants had paid Rs. 13,18,184.88 on 6.4.87. Being aggrieved, the appellants preferred an appeal to the Collector (appeals). By order dated 30.6.88, the Collector (Appeals) set aside the impugned adjudication order and allowed the classification at 15% as prayed for by the appellants. After the classification dispute ended in favour of the appellants they preferred 3 refund claims for the excise duty paid and the Assistant Collector while permitting refund of the differential duty paid by the appellants in Rs. 25,61,792/- for the period 1.11.86 to 30.9.87 and further sum of Rs. 10,78,485.76 for the period 1.2.86 to 20.7.88 rejected claim for refund for Rs. 13.18,184.88 for the period 1.3.86 to 31.10.86 on the ground that duty was not paid under protest in terms of Rule 233 B of *Central Excise Rules, 1944*. The appeals preferred by the appellants were dismissed by the Collector (Appeals) and by the majority view of Central Excise & Gold (Control) Appellate Tribunal (in short 'CEGAT'). Hence the appellants have come by way of appeal under Section 35 L of the *Central Excise Act, 1944*.

3. Mr. Joseph Vellapally, learned senior counsel appearing on behalf of the appellants contended that the appellants had been paying excise duty @ 15% till 31st October, 1986 based on an approved price list. However, on a visit by the Assistant Collector on 28th October, 1986, the appellants were informed that they were required to pay excise duty @ 40% and accordingly the appellants were directed to pay the differential duty. The thereafter on 31st March 1987 the Assistant Collector had issued a show-cause notice asking the appellants to show cause why duty @ 40% should not be demanded denying the benefit of Notification No. 377/86 for all past clearances. That consequently the assessee paid the duty amount on 6.4.87, pending conclusion of adjudication proceedings initiated vide show-cause notice dated 31st March, 1987. That the differential duty was paid accordingly on 6.4.87 amounting to Rs. 13,18,184.88 for the period 1.3.86 to 31.10.86 and while making the said payment an endorsement was made on the challan indicating payment under protest. It was further pointed out that after making payment under protest on 6.4.87, a letter was also addressed by the appellant to the Assistant Collector in reply to the show-cause notice dated 31st March, 1987. In the said letter the appellants indicated the ground of protest. Learned counsel for the appellants contended that ultimately the appellants succeeded in their case before the Collector (Appeals) and the adjudication order was set aside and the case of the appellants that their product was subject to levy of duty @ 15% advalorem was accepted by the appellate authority. It was argued that once the matter was resolved in favour of the appellants, their claim for refund for the period in question should have been allowed without applying the limitation of 6 months as the duty was paid under protest. It was argued that in the facts and circumstances of this case Rule 233 B was not applicable as the said Rule contemplates that where the assessee wants to pay the duty under protest, he shall deliver a letter to the competent authority giving grounds for payment of duty under protest and once the said letter was acknowledged, it constituted a proof that the assessee had paid the duty under protest. It was argued that although Rule 233 B(3) was contingent upon compliance of sub-Rule (4) which requires an endorsement of duty paid under protest on copies of gate passes and RT 12 forms, in this case, such endorsement could not have been made because the differential duty has been paid much after the clearance of the goods. It was further argued on behalf of the appellants that there was substantial compliance of the Rule 233 B as the duty under protest was paid by making an endorsement on the challan. He contended that

the appellants paid duty after they were asked to do so by the Assistant Collector that goods were required to be classified otherwise than what was approved in the classification list. He, therefore, contended that the Tribunal erred in coming to the conclusion that the protest was not in terms of Rule 233 B of the Central Excise Rules.

4. Per contra, Mr. R.P. Bhatt, learned senior counsel for the Department pleaded that under Section 11 B(1) of the Central Excise Act, 1944, 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 6 months from the relevant date. That under the proviso to Section 11 B(1) an exception is culled out to the effect that the limitation of 6 months shall not apply where any duty has been paid under protest. Learned counsel for the Department submitted that the appellant in this case seeks to fall under the proviso to Section 11 B(1). He submitted that on their own showing the appellant applied for refund of differential duty for the period 1.3.86 to 31.10.86 vide refund application dated 10th August, 1988 purporting to comply with Rule 233 B. He contended that in this case Rule 233 B has not been complied with by the appellants as the payment was made on 6.4.87 for the period 1.3.86 to 31.10.86 whereas Rule 233 b required payment of duty preceded by a letter of protest. It was pointed out that in the present case payment was made on 6th April, 1987 and it was not preceded by protest leter. Than on the contrary the letter of protest was lodged after payment on 6.4.87, hence there was non-compliance of Rule 233 B(1). That on the date of payment there was no protest. It was further argued on behalf of the Department that under Rule 233 B(4), the duty paid under protest shall be endorsed on the copies of the gate passes and on RT-12 returns. That in the present case since the clearances have been made there was no question of endorsement of the gate passes and RT-12 returns and, therefore, there was no non-compliance of Rule 233 B(4). That since there was non-compliance of Rule 233 B(4), there was no protest which is the consequence indicated in Rule 233 B(8). It was argued that payment of duty under protest was required to be made only in terms of Rule 233 B so that an assessee is not required to file refund claims on an ongoing basis and his protest under that rule would absolve the appellants from filing refund claims for every clearance. That Rule 233 B(4) was procedural and mandatory and that it excluded all other forms of payment under protest except the one mentioned in the said rule. It was argued that in the present case there was no demand from the Department calling upon the assessee to make payment of the differential duty for the period 1.3.86 to 31.10.86. That the assessee had made the payment suo moto on 6.4.87 in respect of the products cleared in the past during the period 1.3.86 to 31.10.86. Learned counsel for the Department submitted that claim of the appellant-assessee was time barred as the claim was not made within six months from the date of payment and therefore the appellant has invoked the proviso to Section 11 B(1) which proviso would stand attracted only if the appellant satisfies the provisions of Rule 233 B. That the said Rule was applicable only to concurrent and future clearances and not to past clearances and hence Rule 233 B was not applicable and therefore the Assistant Collector was right in rejecting the claim of the appellant as not maintainable.

5. In rejoinder, learned counsel for the appellants raised on alternative contention, which in our view, merits acceptance. It was argued that ultimately in the classification dispute, the appellant-assessee has succeeded and the case of the appellant has been accepted by the

appellate authority and duty has been levied @ 15% as contended by the appellant. It was argued that under the circumstances the appellant-assessee was entitled to refund of duty paid after the classification dispute cropped up.

6. Learned counsel on both sides agreed that compliance of Rule 233 B as condition precedent to the proviso to Section 11 B(1) of the Act is not required in cases falling under Section 11 B(3) of the Central Excises & Salt Act, 1944. In such cases the Assistant Collector is bound to give effect to the orders passed in appeal or revision under the Act while granting refund of excise duty which becomes due and payable to the applicant without his having to make any claim in that behalf.

7. In the normal course, two points would have fallen for determination - Whether in the facts and circumstances of the case, the Tribunal was jus6tified in holding that the payment of differential duty of Rs. 13,18,184.88 cannot be regarded as payment made under protest and, therefore, the refund was not admissible by virtue of the time bar under Section 11 B of the Act and whether in the facts and circumstances of the case, the Tribunal was right in holding that compliance of Rule 233 B of *Central Excise Rules, 1944* was a condition precedent to the applicability of the proviso to Section 11 B(1) of *Central Excises & Salt Act, 1944* (as it stood at the relevant time)?

8. The above two points are inter-linked and it has bearing on the core issue whether the duty was paid under protest. In this case the Tribunal has relied upon Rule 233 B in support of its view that in order to put a protest payment the conditions and circumstances mentioned in Rule 233 B should be complied with, otherwise there could be no protest payment under the Act. On this reasoning the Tribunal denied refund to the appellants. However, there was one more reason for denying the refund. According to the Tribunal the differential payment was not the result of demand or legal compulsion.

9. In our view the decision on the larger issue of compliance of Rule 233 B as condition precedent to the applicability of the proviso to Section 11 B(1) need not be gone into as the appellants are entitled to relief of refund on the facts of this case in terms of Section 11 B(3) which reads as follows:-

> "(3). Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf."

10. In the present case the show cause notice issued by the Assistant Collector demanding reclassification was in relation to the past clearances and when the appellants succeeded in the reclassification dispute before the Collector (Appeals) 30th June, 1988, the appellants were entitled to refund of the defferential amount of Rs. 13,18,184.88 under Section 11 B(3) refer to consequential relief which an assessee is entitled to on his succeeding in appeal/revision. In the present case the appellants have succeeded before the Collector (Appeals) on 30th June, 1988 and consequently the appellants herein were entitled to refund

under Section 11 B(3) of the Central Excise & Salt Act, 1944. Therefore, on facts of this case we are not required to examine the aforestated larger question arising in the matter since the appellants are entitled to relief under Section 11 B(3) of the said Act of 1944.

11. In the circumstances, Civil Appeal No. 9044 of 1996 stands allowed and the judgment and order of CEGAT dated 5.1.1996 in Appeal No. E/436/90/MAS is hereby set aside with a direction to the Department to refund the differential duty of Rs. 13,18,184.88 for the period 1.3.86 to 31.10.86 with interest at 9% per annum from date of the receipt of the copy of this judgment by the Competent Authority till payment. However in view of the facts and circumstances of this case there will be no order as to costs.